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Analysis of the upcoming modernisation of the trade pillar of the European Union-Mexico Global Agreement

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STUDY

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ABSTRACT

The 1997 Global Agreement between the EC and its Member States and Mexico, together with the set of decisions taken in its framework, has been effective, and thus modifications of the agreement are mainly motivated by changes in the global landscape since it was first enacted. Therefore, broad considerations on how the European Union (EU) trade policy is shaped are extremely relevant for the upcoming negotiations with Mexico. In this context, the needs and expectations, both from the EU and Mexico, regarding any further agreements are examined, focusing in particular on areas beyond trade in goods and services such as procurement, investment, and regulatory cooperation. It is argued that the 'old' Association Agreements should be taken as models for any modifications, given their emphasis on EU-specific issues and their ability to accommodate the needs of Mexico in any deepened agreement.

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Preface

The length and structure of this study have been established by the Terms of Reference (ToR) given to the authors.[1] As no new deep and comprehensive research could be conducted within its framework, and most of the available data and analyses have already been the subject of evaluation and impact studies commissioned or produced by the European Commission[2] (some very recently) and are at the disposal of the European Parliament (EP), this study emphasises its policy orientation, attempting to define and discuss the main issues that must be tackled in the EP before the launch of and during negotiations. This study discusses some of the broad considerations on European Union (EU) trade policies that, while not normally analysed in academic literature (and even less in consultancy reports), are extremely relevant for the upcoming negotiations with Mexico, and should be taken into account by the EP.

As established in the ToR, this study examines the results of a series of interviews (more than twenty) conducted with relevant actors both in the EU and Mexico (officials in governments and EU institutions, representatives of business and civil society, academics, and researchers). The interviews were conducted on a confidential basis and no list of interviewed persons can be published.

[1] This study has been commissioned to both authors, together with a second study concerning the agreement with Chile to be submitted in April. Therefore, there will be abundant cross-references between the studies, even if each will be read separately. Ramon Torrent is the main author for this study; accordingly, any questions should be addressed to him. Rodrigo Polanco will be the main author for the study on Chile.

[2] See: a) Copenhagen Economics, 'Ex Post Assessments of Six EU Free Trade Agreements' (February 2011) <http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147905.pdf> accessed 3 February 2016; b) ECORYS, 'Ex-Post Evaluation of the Implementation of the EU-Mexico Free Trade Agreement' (11 May 2015) <http://www.fta-evaluation.com/mexico/wp-content/uploads/sites/2/2015/06/REVISED-Mexico-ITR-ex-post-11May.pdf> accessed 3 February 2016; and c) Commission's staff Working Document (ex-ante Impact Assessment) that accompanies the Recommendation to the Council for the adoption of the 'mandate' for the future negotiations with Mexico, not yet public.

1 Introduction

It is often forgotten that the overall context and political perspective of trade policy in the framework of the EU is vastly different from that of the third countries with which it negotiates international agreements. This is particularly relevant to this study (as discussed more fully in subsequent sections) because an increasing number of prominent and influential members of the Mexican community view the EU as a declining world power and Mexico as a rising one.[3] This sentiment will certainly influence the upcoming EU-Mexico negotiations.

In third countries, trade policy is simply **one** element of a very complex set of policies that are defined and implemented by governments and parliaments. It does not necessarily prevail over all other policy priorities, and is often put to the service of much broader policies. Frequently, international trade negotiations are used as instruments of internal policy reforms in trade and other areas. However, this has never been the case for the European Community (EC) and cannot be the case for the EU, which remains a political entity with only limited (and sometimes extremely limited) powers based on the principle of 'attribution/conferral of competences.' In fact, trade policy has always been the EU's **main uncontested exclusive competence.** For the EU, and previously for the EC, 'trade-relatedness'[4] is a continual argument (sometimes even a nickname) used to expand this exclusive competence beyond its reasonable limits. This is irrelevant for third country governments, in which nobody denies that all policies are 'inter-related' and generally non-hierarchical.[5]

This inherent and unavoidable EU characteristic has a very important effect on the negotiation of international trade agreements and will undoubtedly influence negotiations with such an important player as Mexico.

- First, it is extremely difficult for the EU to articulate an offensive trade agenda with clear priorities that can also establish trade-offs with its defensive interests. Indeed, the criteria for this articulation can only stem from other policies, most of which, in the case of the EU, remain under Member States' competences.
- Second, this difficulty is aggravated by another structural problem, which has yet to be addressed and that remains critically important for trade policy after the entry into force of the Lisbon Treaty: the distinction between 'external' (i.e. the negotiation and signing of international agreements) and 'internal' (i.e. the enactment of internal legislation) EU competences. The EC's exclusive competence on international trade has always covered both aspects. However, does the enlargement in scope of the EU's exclusive competence on trade policy brought about by the Lisbon Treaty cover both its external and internal competences? When the text of Article 207 on trade policy of the new Treaty on the

[3] Members of the Mexican elite, interviewed in accordance with the ToR for this study, unanimously held that perception. All projections towards 2040 - 2050 seem to favor Mexico more than the EU, although this is certainly debatable. Mexico is viewed as a leading world economy with a GDP much greater than that of most EU Member States and even equal or greater than Brazil's in some projections. Most believe that Mexico, as a large economy and developing country, has more future growth potential than the mature markets of the developed EU members. The Mexican economy is forecast to be the fifth largest worldwide by 2040, after those of China, the United States, India, and Japan. Bradly J. Condon, 'European Union-Mexico Economic Partnership Coordination and Cooperation Agreement' in Simon Lester and Bryan Mercurio (eds.), *Bilateral and Regional Trade Agreements: Commentary and Analysis* (Cambridge University Press 2009) 75.

[4] This neologism seems irreplaceable for two reasons: a) it has been widely used since the World Trade Organisation (WTO) was established (Trade-Related Aspects of Intellectual Property Rights (TRIPs), Trade-Related Investment Measures (TRIMs), among others) and b) 'trade-relatedness' was a term often used by the European Commission to give a very broad interpretation to the EC exclusive competence on foreign trade.

[5] As we shall see later on, this is also very relevant for the architecture of the agreement. The division in 'pillars', which can make sense from an EU institutional perspective, is completely dysfunctional from a third country perspective, as it 'insulates' trade from the beneficial effects it could receive from political dialogue.

Functioning of the EU (TFEU) first appeared as part of the 'Constitutional' Treaty issued from the Convention for the Future of Europe, it was written in two versions. One version, written in English, clearly stated that the enlargement of EU competences concerned only external competences (the negotiation and signing of international agreements);[6] while the second version, written in French and most other languages, did not include this distinction. During the linguistic revision of the text, the second version prevailed. How should this be interpreted in an area that is of key importance for negotiations with Mexico, such as foreign direct investment (FDI)?

- Should this be interpreted to mean that Member States lose their competences to enact legislation affecting FDI, which is instead conferred to the EU as an exclusive competence? If this is the case, is the EU able to cope with such an overwhelming burden? At first glance, the answer is decisively negative.[7]

- However, if the answer is negative legally or in practice, and it is accepted that Member States retain internal competence in the area of FDI even if they have conferred to the EU the exclusive competence to negotiate international agreements, how can the EU define a coherent (and ambitious) external policy in such an important area that remains under the internal competence of the Member States?

- Third, these inherent issues have affected the external economic relations of the EC, and later the EU, because they are often driven by internal institutional considerations rather than by economic strategies. This is particularly true for relations with Latin American countries, like Mexico, and Latin American sub-regions. There are three main internal institutional considerations:
  - The internal operation of the European Commission and its relationship with the EU Council (and, to a lesser extent, with the EP).
  - The need to provide content for periodical bi-regional summits that are very often seen as more important for the government holding the presidency of the EU Council, which is hosting and chairing the summit, than for the EU as a whole.
  - The successive reforms of the treaties and the subsequent changes introduced to the distribution of competences between Member States and the EC/EU. International agreements were used by the EC to anticipate, justify, or operationalise these changes.

The first consideration, which will be discussed in detail in the next section, was the primary consideration behind the new wave of negotiations in the mid-1990s (which led to the agreements with the Southern Common Market -MERCOSUR- in 1995, Chile in 1996, and Mexico in 1997). The second consideration can be ascribed exclusively to the second agreement with Chile (2002/2005) and the negotiations with Central America and the Andean Community. The third consideration has already

[6] This separation between 'external' and 'internal' competences was designed by the Legal Service of the EU Council as a possible element to be accepted in the framework of the 1997 Amsterdam Treaty for new areas to be included within the scope of the EC's exclusive competence in commercial policy. Although it was not ultimately accepted, the idea somehow remained on the table. It constitutes a sort of 'federalizing' approach in which the EU plays an enhanced role at the international level, while allowing Member States to retain domestic legislative competence (provided, of course, they respect the international agreements concluded by the EU).

[7] This key political problem is often neglected. The paradigmatic example, which is very troubling and systematically ignored, is that of the EC's exclusive competence on the General Agreement on Trade in Services (GATS) mode 1 of supply of services: cross-border supply. The Court of Justice of the European Union, in its Opinion 1/94 of 15th of November 1994 (Distribution of competences between the EC and Member States concerning WTO agreements), ruled that this fell under exclusive EC competence. However, the EC was, and now the EU remains, unable to exercise this competence and Member States continue to sign agreements in this very broad area with the tacit acceptance of all EU institutions.

affected the structure and content of the 2000-2001 Joint Council Decisions that comprised the 1997 agreement with Mexico, as well as those of the second agreement with Chile. This consideration is central to the explanation, as it will be analysed later in this report, of the evolution of the nature and characteristics of the bilateral agreements negotiated by the EU. For example, the agreement with Singapore is the object of a yet unsolved dispute between the European Commission on the one side, and the Member States and the EU Council on the other, concerning the distribution of competences between Member States and the EU.

Negotiations with Mexico, regarded as critical by many EU institutions, as well as by several leading Member States, could be a welcome opportunity to address these issues. In fact, this is the main challenge underlying all of the others that will be discussed in the following sections of this study.

2 Brief overview of the trade pillar of the 1997 EU- Mexico Global Agreement

The perception of the present state of trade relations with Mexico is obscured by the lack of an adequate understanding of its legal framework and the underlying policy.[8] The presentation of inconsistent information regarding the EU–Mexico relationship on many EU websites also contributes to this lack of understanding. The most accurate and comprehensive compilation of information on this relationship, at least through 2015, remains that of the Foreign Trade Information System (SICE in its Spanish acronym) of the Organization of American States (SICE – OAS: www.sice.oas.org). This section of the study will attempt to clarify the legal framework and corresponding policy of the EU-Mexico Global Agreement, and it seeks to provide a clear and cohesive source of information for future discussions in this area.[9]

2.1 The legal framework

The first misunderstanding regarding the EU-Mexico trade relationship concerns the name of the basic agreement that created the legal framework. The agreement, signed in 1997, is often referred to as a 'Global Agreement' and an 'Association Agreement', which can be confusing. Part of this confusion is linguistic. In English and in many other languages, the agreement is called the 'Economic Partnership, Political Coordination and Cooperation Agreement'; however, in Spanish, it is called the 'Acuerdo de asociación económica, concertación política y cooperación'. As many EC and EU agreements with third countries are 'ranked' by title rather than by content, this difference in terminology is politically relevant.[10]

The second misunderstanding concerns how the economic content was added to this initial Global Agreement, which simply created an institutional framework (essentially, a Joint Council able to adopt decisions[11]—secondary law—that enter into force without any act of ratification or acceptance),[12] in 2000 and 2001.[13]

[8] This is the case even in an otherwise very useful and much longer study previously commissioned by the European Parliament: European Parliament - Directorate General for External Policies, 'The Modernisation of the European Union-Mexico 'Global Agreement'' (January 2015) <http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534985/EXPO_STU(2014)534985_EN.pdf> accessed 4 February 2016, whose editorial closing date was October 2014. The information provided by that study can provide background information for this one.

[9] This section draws heavily from Ramón Torrent, 'Las Relaciones Unión Europea–América Latina En Los últimos Diez Años: El Resultado de La Inexistencia de Una Política' (2005) Barcelona, OBREAL-EULARO (available only in Spanish).

[10] The confusion has its origin from1992-1994 in the context of the negotiation of an agreement with Russia (replicated afterwards with most Republics from the former Soviet Union) that had to be 'better' than the former 1989 Trade and Cooperation Agreement with the Soviet Union, but 'not so good' as an Association agreement. As the negotiations were conducted in English, it was suggested to name the agreement '**Partnership** and Cooperation Agreement' ('Partenariat et Coopération' in French). However, it was overlooked that in Spanish there is not an equivalent term for 'partnership' other than 'association'. Therefore, the translators proposed to translate 'Partnership' as 'Asociación'. This move upset many diplomats, who, in turn, vetoed this translation. The term was ultimately changed to 'Colaboración' (a word that misrepresents 'Partnership'). In the framework of the Agreement with Mexico, the translators (with the help of pressure exercised by the Mexican Mission before the EU) finally had the advantage and had 'Partnership' translated as 'Asociación'. However, it remains that, in the case of Mexico, the 'Asociación' is 'Asociación económica' and not 'Asociación' without a qualification, as in the 'true' Association Agreements.

[11] It is sometimes asserted that: 'The institutional framework of the Agreement also had some unique features at the time. The Joint Council, the main body governing the agreement, not only had the traditional function of monitoring and supervising the implementation and administration of the agreement, but also the primary responsibility of the agreement negotiation'. ECORYS (n 2) 8. However, this is not accurate. See the explanation later on the European Economic Area, European, and Euro-Mediterranean agreements.

[12] The misuse of the distinction between intergovernmental and supranational has created confusion, as supranationality is often perceived as an exclusive characteristic of internal European law. This is wrong, as the EU–Mexico agreement itself proves. Therefore, it is better to replace this distinction with a more neutral one, between primary and secondary law. 'Secondary law' refers to new law that has been created in the framework of an international treaty or agreement and enters into force without

- First, the Global Agreement (signed on 8 December 1997) between the EC **and its Member States** and Mexico was accompanied by an Interim Agreement, which only covered trade and trade-related matters. The Agreement was signed by the **EC alone**, entered into force much sooner (1 July 1998), and reproduced the same institutional structure.
- Second, the entry into force of the **Interim Agreement** allowed for the opening of negotiations on content development by the Joint Council in the area of trade in goods and related matters. Negotiations were also launched to develop the content of the **Global Agreement** in the area of services. The 'parallelism' between both negotiations was requested by many Member States that wished to use their competence in the area of services to block any undesired development in the area of goods (which could be approved by the EU Council by a qualified majority).
- Third, when the EC and Member States´ ratification procedures of the Global Agreement and the parallel negotiations on goods and services were already well advanced, the Joint Council of the Interim Agreement enacted its decision liberalising trade in goods (Decision Nº 2/2000 of the EC-Mexico Joint Council of 23 March 2000, in force since July 2000). Later, after the entry into force of the Global Agreement in October 2000, the Joint Council enacted its decision on services (Decision Nº 2/2001 of the EU-Mexico Joint Council of 27 February 2001, in force since March 2001), which lacked substantial content (this will be discussed later in the report). Therefore, the EU–Mexico Free Trade Agreement (FTA) that many mention simply does not exist.

2.2 Content

It is sometimes asserted that, at the time of its conclusion, the agreement with Mexico 'was the most comprehensive trade agreement that had ever been signed by the EU'.[14] However, this statement is not accurate. The set of agreements and decisions signed and adopted between 1997 and 2001 fall quite short not only of the European Economic Area (EEA) Agreement but also of the Association Agreements with Central and Eastern European and Mediterranean countries.

The effective scope of the liberalisation of the agreement was largely restricted to trade in goods (Joint Council Decision 2/2000), with a minor liberalisation of trade in services (Joint Council Decision 2/2001). The key challenges to the degree of liberalisation were with respect to the tariff elimination schedules for industrial products, agricultural trade, and services. Regarding industrial goods, the EC eliminated its tariffs in 2003, while Mexico obtained a longer transition period (until 2007), with exceptions regarding certain products of interest (e.g. automotive goods) whose tariffs were also eliminated in 2003. With respect to agricultural trade, sensitive EC agricultural products were protected (e.g. cereals, meat, and dairy products that benefitted from the EC's export subsidies). Liberalisation was contingent upon reforms to the EC's Common Agricultural Policy (CAP), which ultimately did not occur, leaving these products excluded from the liberalisation process. Tariff elimination for the remaining covered agricultural products was scheduled to take place within 10 years, and included preferential quotas and seasonal windows for Mexico. Regarding services and investment, Mexico provided the EU with the same access to financial services enjoyed by North American Free Trade Agreement (NAFTA) members.

an act of ratification or acceptance by the Parties. See Ramon Torrent, 'Regional Integration Instruments and Dimensions: An Analytical Framework' in Robert Devlin, Antoni Estevadeordal and Inter-American Development Bank (eds), *Bridges for development: policies and institutions for trade and integration* (Inter-American Development Bank : Distributed by the Johns Hopkins University Press 2003).

[13] The precedent used to conceive this approach was that of the 1963 Ankara Agreement with Turkey, which set up a Joint Council that, many years afterwards, adopted the decision on the EU–Turkey Customs Union, which finally entered into force in 1995.

[14] ECORYS (n 2) 7.

However, in other areas of services, the EC and Mexico only agreed to not introduce new restrictions in national legislation.[15] Further liberalisation was placed on hold pending developments in the WTO and, this has not changed as of the writing of this report.

It is therefore not surprising that the agreement's effects are low according to currently available evaluation and impact studies.[16] In fact, the agreement was signed in 1997 as more of a 'political agreement' creating an institutional framework than as a trade agreement. Furthermore, the development of its policy content in 2000 and 2001 was merely an exercise to show that the expectations raised by the 1997 agreement were fulfilled, as opposed to the development of real trade policy. This is why it is important to explain the lack of trade policy behind the 1997 agreement.

2.3 The (lack of) trade policy behind the 1997 Global Agreement

From a policy perspective, and looking to future negotiations, it is much more interesting (and revealing) to discuss the policy behind the 1997 Global Agreement and its implementation decisions than the details of its content.

The accounts usually given of the motivations for launching negotiations with Mexico in the 1990s are generally misleading and do not take into consideration many relevant facts.[17]

1. The timing

In the 1990s, the European Commission recommended to the Council the launch of negotiations with MERCOSUR, Chile (one year after), and Mexico (two years after). It is difficult to determine the exact date of origin of such proposals, that is to say, the exact moment in which the services of the European Commission conceived their initiative. However, such services applied pressure to the governments of MERCOSUR countries to modify the 1991 Treaty of Asunción to vest MERCOSUR with legal personality and, therefore, be able to consider an interregional agreement 'between organisations'. As this modification was shaped in the Ouro Preto Protocol in December 1994, the inception of the European Commission's initiative with a view to concluding an agreement with MERCOSUR commenced before that date.

This chronological accuracy is important as it clarifies a much-generalised misunderstanding in relation to the opening of negotiations with Mexico. The European Commission's initiative to negotiate an agreement with Mexico **is not 'a reaction to NAFTA'**. Rather, the European Commission follows its own initiative to negotiate a series of new agreements with countries and zones of Latin America, first with MERCOSUR as a whole, and then with Chile and Mexico. The origin of this initiative shall be regarded as 1992/1993. At that time, even though the NAFTA process was underway, its effects had yet to be ascertained (the Agreement entered into force in 1994). We must recall that NAFTA's ratification process was heavily contested both in Canada and the United States, especially during 1993.[18]

2. What were the motivations behind the European Commission's initiative to negotiate a new series of agreements with the countries and sub-regions of Latin America?

[15] Bradly J. Condon (n 3) 86–88.
[16] See Copenhagen Economics (n 2).
[17] As already said, this section draws heavily from Ramón Torrent, 'Las Relaciones Unión Europea–América Latina En Los últimos Diez Años' (n 9). This piece is written largely in the first person. The author was, at the time of the negotiations with Mexico, the Director for External Economic Relations in the Legal Service of the EU Council and was deeply involved in the negotiation process, the design of the EU's strategy, and the institutional framework created by this agreement.
[18] Jeffrey S. Lantis, *The Life and Death of International Treaties: Double-Edged Diplomacy and the Politics of Ratification in Comparative Perspective* (Oxford University Press 2009) 34–50.

During the 1990s, the EC (on its own or jointly with its Member States) engaged in a race towards negotiating bilateral agreements with all of the countries and regions of the globe. Therefore, it would have been surprising that Latin America was overlooked. In other words, one should not look for too many specific reasons to explain why Latin America would *also* be included in this wave of new agreements. Rather, *not* including it would have required a specific explanation (in Latin America, the Andean Community and Central America were judged by the EC as 'not yet ripe' because of their violent internal conflicts).

This negotiating frenzy coincides with (in order to avoid the more debatable expression of 'should be attributable to a greater extent to') a progressive loss of coherence in the European Commission's actions, above all in matters concerning international relations. This loss of coherence intensified after the new European Commission, presided over by Jacques Santer (1995-1999), scattered responsibility for foreign relations between four Commissioners, but the lack of coherence existed already in the early 1990s, when the new initiatives of the European Commission towards Latin America were born.[19]

It was well known at the time that new initiatives involving international agreements were not founded on economic considerations, but rather exclusively on simplistic 'geo-strategic considerations' (e.g. as 'a reaction to the fall of the Berlin Wall', 'a reaction to the dissolution of the Soviet Union', 'we should build a Mediterranean policy', or 'how we are going to forget Latin America?').[20]

It is important to remember that the European Commission's initiative to negotiate a new round of agreements with Latin American countries and sub-regions began with MERCOSUR. And the essential motivation in the minds of those who conceived this agreement was not economic, but purely political-institutional. It was meant to bring a specific contribution to the new wave of agreements with all the countries of the world: the first 'inter-regional' agreement between two organisations of regional integration, or an agreement that would be the best example of 'open regionalism', transformed in 'open bi-regionalism'. This assertion can be checked with those who participated in the idea's genesis in Brussels, and with those in the MERCOSUR states who received pressure from the European Commission to vest MERCOSUR with legal personality.

3. Were there specific motivations for Mexico to negotiate this new agreement? The agreement with Mexico: myth and reality

It could be argued that, even if there were no specific economic policy motivations from the EU for launching the new wave of agreements with Latin American countries and sub-regions in the first half of the 1990s, a specific set of motivations for Mexico developed in the second half of the decade. This explains why, in 2000, the Joint Council Decision liberalising trade in goods could be adopted. However, such an argument does not seem to fit the facts.

The European Commission's proposal in 1994-1995 for an agreement with MERCOSUR was intended to reach a free trade zone in one stage. However, during the discussion within the Council, the two-stage solution was adopted. First, an institutional framework void of economic obligations would be created (the agreement of 1995). Second, negotiations regarding the development of the content would be conducted (and remain on-going 20 years later). In essence, this was the same solution as that adopted for Mexico. Therefore, it can be assumed that the initial content of the initiatives were the same for both

[19] The need to 'bring order' to the disorderly state of the European Commission's international trade relations was the main reason why the French Government pushed to have Pascal Lamy designated as Trade Commissioner in 1999 and was why Lamy immediately enacted a *de facto* moratorium on bilateral trade relations (broken for Chile in 2002 for reasons that will be commented upon in the parallel study for Chile).

[20] The current procedures on stakeholder consultation, scoping, etc. were introduced precisely to change the approach based exclusively on simplistic 'geo-strategic considerations'.

MERCOSUR and Mexico. The European Commission proposed for them the establishment of free trade zones, as it did for Central and Eastern European and Mediterranean countries. This was independent from Mexico's specific circumstances, from NAFTA, and from NAFTA's effects on Mexico.

At the time of the Global Agreement negotiations with Mexico, NAFTA had been in force for nearly three years (since 1 January 1994), and its effects were beginning to be felt. Despite this, the European Commission's 1996 proposal to negotiate an FTA with Mexico was received by the Council and the governments of most Member States with a similar coldness as when they had received the equivalent proposal for MERCOSUR. It became rapidly clear that, at best, what could be reached was a two-phase mechanism similar to that of the agreement with MERCOSUR: an empty institutional framework agreement with future negotiations to give content to it.

It is true that, as previously explained, the 1997 framework agreement with Mexico was different from the 1995 framework agreement with MERCOSUR: the former could gain economic content simply by decisions of the Joint Council created by the same agreement, instead of requiring the cumbersome negotiation of a new agreement (like in the case of MERCOSUR). This institutional difference, even if it was simply formal, facilitated the subsequent negotiations and gave the 'signal' that the EU envisaged the future of its relations with Mexico somehow differently than (and more favourably than) its relations with MERCOSUR. However, the specificity of the framework agreement with Mexico does not stem from a strategic response to NAFTA by EU institutions or from governments of EU Member States. If this was the case, a much speedier and more effective response would have been to enter directly into the negotiations for trade liberalisation instead of postponing them. Four main reasons unrelated to NAFTA explain this specification:

- First, the new Spanish government of José María Aznar showed support from the beginning, within the EU Council, for a trade liberalisation initiative with Mexico.[21] Felipe González's government had not supported the proposal for a free trade zone with MERCOSUR as presented by the European Commission, but had simply welcomed the possibility of adding to the 1995 'success' of the European Council held in Madrid. The achievement in Madrid was the solemn and very visible signature of the framework agreement with Mexico, which was used as an asset for the upcoming general elections that were eventually lost by Gonzalez's Spanish Socialist Party.
- Second, the Spanish civil servants based in Brussels[22] fought with tremendous tenacity to achieve a framework agreement for Mexico that, even if it was entirely empty of effective content,[23] was at least better from an institutional point of view than the MERCOSUR agreement.
- Third, the German government supported the positions of the Spanish government.
- Fourth, European Commission officials and the Legal Service of the Council invented this institutional novelty of the agreement with Mexico (i.e. a Joint Council vested with the power to give content to the agreement through its decisions), adapted from the Ankara Agreement with Turkey.

The remaining participants in the negotiations within the EU Council (the representatives of the other 13 Member State governments) would have been pleased with reproducing the framework agreement with MERCOSUR for Mexico, as was done for Chile. If this had been the case nothing would have been

[21] The reasons that could motivate this position of Aznar's government are relatively irrelevant for the purpose of this study, as they refer to EU policy as a whole. We could suppose that they range from a more liberalising attitude on general economic policy to ascertaining that free trade with Mexico is much less conflictive for Spanish interests than free trade with MERCOSUR.
[22] In order to assess this, the EP could convene the current Spanish Ambassador in Pakistan, Luis Tejada, who at the time was in charge of Mexico in the Spanish Permanent Representation before the EU.
[23] The reference to 'effective content' as one of the four dimensions of Regional Integration is taken from Ramon Torrent (n 12).

accomplished during 2000-2001 because of the absence of a Joint Council able to produce secondary law through its decisions.

This clarification must also be extended to the economic figures. The essential element is that, contrary to what is continually repeated, the EC did very well with Mexico in the 1990s regarding international trade, despite, or more likely because of, NAFTA. The fact that European exports decreased in relative terms within the total of Mexican foreign trade should not be surprising because NAFTA had greater trade-creating effects intra-zone than extra-zone. These figures are so surprising that they are worth noting:

- During 1990-1999, EC exports to Mexico increased at an annual rate of almost 12 %, while EC exports to the rest of the world increased annually by only 7 %.
- The commercial surplus of the EC with Mexico was approximately 10 % of total bilateral trade in 1990, and it increased to more than 40 % by 1999. In other words, if there was an interest in liberalisation agreements to expand exports, it was from Mexico and not from the EC.[24]

Therefore, there is no objective reason to state that NAFTA had such disastrous effects on EC exports to Mexico so as to force the EC to retrieve any lost ground with a trade liberalisation agreement. On the contrary, the EC was more successful exporting to Mexico than to the rest of the world on average. So then, which factor was the most decisive in allowing us to understand the speed with which the EU-Mexico Global Agreement negotiations unfolded for the policy development of the framework agreement? Evidently, the existence and success of NAFTA contributed to strengthening the arguments, more political than economic, that favoured the swift conclusion of negotiations. However, the three most relevant decisive facts are the following:

- First, the trade agenda between Mexico and the EC was not very controversial (largely because Mexico was not a big exporter of products targeted by the EC's agricultural policy, among others).
- Second, for Mexico, the increase of exports to the EC was not purely an issue of economic policy; rather, the agreement with the EU was and somehow remains first an instrument of political re-equilibrium. Accordingly, Mexico was willing to accept excluding from the agreement those products, especially agricultural products, which were sensitive to the EC.
- Third, the quality and tenacity of Mexican negotiators (more or less the same team that had negotiated NAFTA).

These three facts can be viewed from the perspective of the EU Council and the European Commission as follows. In the absence of a specific policy, why not conclude an agreement in which the other Party is very interested, that does not cause any problems, and that can gain content simply by a Joint Council's decisions, avoiding ratification by EU Member State parliaments insofar as it covers areas of Member State competences? On that basis and as already noted, we should not be surprised that recent impact assessments of this agreement found that its practical effects were very low, especially for the EU. This is, indeed, the very reason why it was concluded in the first place.[25]

[24] Data from EUROSTAT, SECOFI and the WTO, elaborated by Bouzas and Soltz, in R. Bouzas and H. Stoltz, *Building a Trade and Investment Hub: Mexico and Preferential Trade Negotiations* (Flacso 2001).

[25] A 2011 ex-post assessment on the EU-Mexico concluded that there was no significant FTA-related impact on EU exports to Mexico, mainly because the tariff reductions are spread out over a long transition period. Conversely, the report found a 92% increase in EU imports from Mexico as a result of the FTA, an economically important and statistically significant result. Copenhagen Economics (n 2) 9-10.

3 Comparison of the trade pillar of the Global Agreement with the relevant new generation EU free trade and investment agreements

After the entry into force of the Joint Council decisions in 2000 and 2001, the EC's trade policy has experienced wide ranging changes. First, the Treaty of Nice enlarged in 2001 the scope of the EC's exclusive competence on commercial policy. Second, Pascal Lamy finalised in 2004 his term as Trade Commissioner and this led to the abandonment of the multilateral approach he had tried to implement in the area of Trade Policy and to the return to the former trend of bilateral negotiations. This change in approach became a formally approved change of policy with the approval by the EU Council of the European Commission's Communication 'Global Europe: Competing on the World' from October 2006, which re-launched the process of bilateral negotiations. Thirdly, a new set of bilateral agreements entered into force following the 'Global Europe' approach.

Given this shift in trade policy, this section compares selected trade and investment chapters of the EU-Mexico Global Agreement and the set of Joint Council decisions adopted in its framework with this new set of 'post- Global Europe' trade agreements. The main reference will be the Comprehensive Trade and Economic Agreement (CETA) that the EU recently initialled with Canada, under the assumption that CETA might be considered a benchmark for the future update of the EU-Mexico Global Agreement. As requested in the ToR, the following sub-sections examine and compare disciplines in government procurement, foreign investment, regulatory cooperation, and sustainable development.

For a more comprehensive analysis of the main content of the EU-Mexico Global Agreement in trade in goods and trade in services, see the studies that the Directorate General for Trade of the European Commission (DG Trade) has carried out or commissioned on the implementation of the EU trade agreements with Mexico.[26]

3.1 Government procurement

1. EU-Mexico Global Agreement

Under Article 10 of the EU-Mexico Global Agreement, the Parties shall agree to the gradual and mutual opening of agreed government procurement markets on a reciprocal basis. To achieve this objective, the Decision No 2/2000 of the EC-Mexico Joint Council of 23 March 2000 included a title on public procurement (Title III, Articles 25 to 38), stipulating substantive and procedural conditions to provide each Party access to the procurement markets of the other Party. The main topics included concern the coverage of the agreed liberalisation (including lists of covered entities, goods, services, and threshold values), non-discriminatory access to the agreed markets, legal and transparent procedures including clear challenge procedures, and the use of information technology.[27]

a) Scope and coverage

The Decision covers procurement methods such as purchase, lease or rental, with or without an option to buy, by central purchase entities or utilities and therefore excluding provincial or sub-federal levels. Entities covered are listed in Annex VI of the Decision.

Goods and services covered are listed in Annexes VII, VIII, and IX. Generally, procurement provisions apply to all goods, with certain exclusions for procurement by EU Ministries of Defence and by the Mexican

[26] Copenhagen Economics (n 2).; and ECORYS (n 2).
[27] ECORYS (n 2) 22.

Secretary of National Defence and Navy. Services are only included if they are explicitly listed in Annexes VIII and IX, including construction and professional services.

Different thresholds for Mexico and the EU are set out in Annex X. Certain exceptions, exclusions, derogations, and measures that allow a more flexible application of these provisions are included in Article 34,[28] Annex XI. Each Party may modify its coverage only under exceptional circumstances, although minor adjustments and formal rectifications are allowed (Article 35). Only regarding these rectifications or modifications, a Party may have recourse to the dispute settlement procedure considered in the agreement.

Article 37 foresees further negotiations between Parties in the case when additional advantages are granted by one of the Parties to a Government Procurement Agreement (GPA) or NAFTA Party, with a view to extend such advantages to the other Party on a reciprocal basis.

The Joint Council may adopt appropriate measures to enhance the conditions for effective access to a Party's covered procurement or to adjust a Party's coverage so that such conditions for effective access are maintained on an equitable basis (Article 38). For example, if a Party wishes to withdraw an entity from the scope of procurement because of its privatisation, the Parties will enter into consultations to restore the balance of their offers (Article 37).

b) Non-discriminatory access

Article 26 enshrines the principles of national treatment and non-discrimination principles for procurement in the covered entities, goods, and services. Among other points, it establishes that each Party will provide to the products, services, and suppliers of the other Party, 'immediately and unconditionally', no less favourable treatment than that accorded to domestic products, services, and suppliers. Furthermore, no less favourable or non-discriminatory treatment shall be given to a locally-established supplier because of foreign affiliation or ownership by a person of the other Party, or because of the country of production for the good or service being provided.[29]

In the same line, Article 27 declares that, for purposes of government procurement, no Party may apply different rules of origin to goods imported from the other Party than those applied in the normal course of trade. In addition, Article 28 stipulates that each Party shall ensure that its entities do not consider, seek, or impose offsets in the qualification and selection of suppliers, goods, or services, or in the evaluation of bids or the award of contracts.

c) Legal and transparent procedures

In reference to procurement procedures, provisions are included in Article 29, while Annex XII specifies the rules and procedures of each Party. Because Mexico is not a member of the WTO GPA and because a parity level of procurement access with NAFTA was a key interest for the EU, the Agreement was modelled on NAFTA provisions for the Mexican side and on GPA for the European side.[30] Therefore, these rules and procedures can only be modified if amendments to the corresponding NAFTA or WTO GPA provisions take place, in which case the modifications will have to maintain equivalent treatment to the other Party. If not, the affected Party may have recourse to the dispute settlement mechanism.

[28] Provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties or a disguised restriction on trade between the Parties, Article 34 consider as exceptions, measures (a) necessary to protect public morals, order, or safety; (b) necessary to protect human, animal, or plant life or health; (c) necessary to protect intellectual property; or (d) relating to goods or services of handicapped persons, of philanthropic institutions, or of prison labour.
[29] ECORYS (n 2) 23.
[30] Philippe de Lombaerde, 'The EU-Mexico Free Trade Agreement: Strategic and Regulatory Issues' (2003) 11 Journal of European Studies 104, 109.

Another relevant provision relates to 'bid challenge' (Article 30), which grants the suppliers rights to non-discriminatory, timely, transparent, and effective procedures to challenge the procedures for awarding contracts. A further provision concerns information and transparency (Article 31), which mandates each Party to promptly publish any law, regulation, precedential judicial decision, administrative ruling of general application, and any procedure regarding covered government procurement; to designate one or more contact points; and to annually collect and exchange statistics on its covered procurements.

A Special Committee on Government Procurement is created in Article 32, which is tasked with the analysis of available information on each Party's procurement market, the evaluation of the effective access of suppliers of a Party to procurements of the other Party (including recommendations to enhance the conditions for effective access to a Party's procurement market), the promotion of government procurement opportunities, and the monitoring of the application of the procurement provisions.

d) Use of information technology

Article 33 provides that the Parties shall cooperate with a view to ensuring that the type of procurement information held in their respective databases, notably in tender notices and documentation, is comparable in terms of quality and accessibility. The Parties shall also cooperate with a view to ensuring that the type of information exchanged through respective electronic means between interested Parties for the purposes of public procurement is comparable in terms of quality and accessibility.

With prior agreement that the type of procurement information is comparable, and paying due attention to issues of interoperability and interconnectivity, the Parties shall grant access to suppliers of the other Party to relevant procurement information (such as tender notices) held on their respective databases, and to their respective electronic procurement systems (such as electronic tendering).

2. CETA

Chapter 19 of CETA deals with government procurement in 19 provisions and in separate market access offers attached separately, which include different thresholds for Canada and the EU, for covered entities, goods, and services. Article I contain a series of useful definitions of terms used in the chapter, something that is not found in the EU-Mexico Global Agreement.

a) Scope and coverage

Like the EU–Mexico Joint Council's Decision 2/2000, the chapter covers procurement by different contractual means such as purchase, lease, and rental or hire purchase,[31] with or without an option to buy.

The scope of entities that are covered by the procurement rules of CETA is wider than in the EU-Mexico Global Agreement, as CETA applies not only to federal-level but also to sub-central government entities. With some notable exclusions,[32] almost all Canadian municipal government procurement will be covered for the first time by an international procurement agreement, including most utilities, Crown corporations, and the broader MASH sector (municipalities, academic institutes, school boards, and hospitals). The EU offer includes EU entities, central government entities, regional or local contracting authorities, contracting authorities that are bodies governed by public law as defined by EU Procurement Directives, and EU utilities that are contracting authorities. This includes exceptions in specific areas, like the purchase of water and the supply of energy or of fuels, the exploration or extraction of oil, gas, coal or

[31] Hire purchase ('compraventa a plazos') is not explicitly included in the EU-Mexico Global Agreement, but it can be understood as part of the generic 'purchase'.

[32] Exceptions include selected entities like Infrastructure Ontario, Ontario's local hydro utilities, and NALCOR (provincial energy corporation for Newfoundland and Labrador).

other solid fuels, and the procurement of agricultural products made in furtherance of agricultural support programmes and human feeding programmes.

Unless otherwise specified, this chapter covers all goods with certain exclusions on the Canadian side for procurement by Canadian defence and enforcement forces,[33] and some regional exceptions like the procurement of mass transit vehicles in Ontario and Québec, and for certain goods of Manitoba Hydro's procurement. On the European side, there are exclusions for procurement by EU Ministries of Defence. Services are only included if they are explicitly listed in market access offers, and include construction and professional services.

General exceptions are included in the same terms as in the EU-Mexico Global Agreement.[34] However, the agreement also considers security exceptions for the protection of each Party's essential security interests relating to the procurement of arms, ammunition, or war material, or to procurement indispensable for national security or for national defence purposes.

Taking a different approach than in the EU-Mexico Global Agreement, in CETA each Party may modify its coverage by previous notification to the other Party in writing, including a proposal of appropriate compensatory adjustments, unless the modification is negligible in its effect or covers an entity over which the Party has effectively eliminated its control or influence. Adjustments and formal modifications are allowed (Article 19.18). Like in the EU-Mexico Global Agreement, only these adjustments or modifications may trigger the dispute settlement procedure of the treaty.

b) Non-discriminatory access

As in the EU-Mexico Global Agreement, CETA enshrines the principles of national treatment and non-discrimination for procurement in the covered entities, goods, and services (Article 19.4). Within Canada, such treatment includes treatment no less favourable than that accorded by a province or territory (including its procuring entities) to goods and services of and to suppliers located in, that province or territory. Within the EU, there is treatment no less favourable than that accorded by a Member State or a sub-central region of a Member State (including its procuring entities) to goods and services of (and suppliers located in) that Member State or sub-central region, as the case may be.

c) Legal and transparent procedures

Like in the EU-Mexico Global Agreement, CETA also has rules on the procedures of public procurement, and each entity shall conduct covered procurement in a transparent and impartial manner, applying the same rules of origin that the Party applies in the normal course of trade, without seeking, taking account of, imposing, or enforcing any offset. Chapter 19 also includes rules on information of the procurement system (Article 19.5) and transparency (Articles 19.6, 19.15, and 19.16), including more detail in issues such as notices for intended and planned procurement, publication of award information and statistics, and disclosure of information.

However, CETA has a more detailed regulation of the procurement process without referring to NAFTA or the WTO's GPA. This includes provisions on conditions for participation (Article 19.7), registration systems and qualification procedures for suppliers (Article 19.8), technical specifications and tender

[33] This includes the Department of National Defence, the Royal Canadian Mounted Police, the Department of Fisheries and Oceans for the Canadian Coast Guard, the Canadian Air Transport Security Authority, and provincial and municipal police forces.
[34] Subject to the requirement that measures are not applied in a manner that would constitute either a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail, or a disguised restriction on international trade, Article III considers as exceptions, measures (a) necessary to protect public morals, order, or safety; (b) necessary to protect human, animal, or plant life or health; (c) necessary to protect intellectual property; or (d) relating to goods or services of persons with disabilities, of philanthropic institutions, or of prison labour.

documentation (Article 19.9), deadlines and time-periods (Article 19.10), negotiation (Article 19.11), and limited tendering (Article 19.12).

Similarly to the EU-Mexico Global Agreement, under Article 19.17 each Party shall provide a timely, effective, transparent, and non-discriminatory administrative or judicial review procedure through which a supplier may challenge a breach of Chapter 19, or a failure to comply with a Party's measures implementing that chapter arising in the context of a covered procurement, in which the supplier has, or has had, an interest.

In addition, as in the EU-Mexico Global Agreement, a Committee on Government Procurement is created in Article 19.19, to exchange information, assess the operation of the procurement provisions, and promote coordinated activities to facilitate access for suppliers to procurement opportunities in the territory of each Party.

d) Use of information technology

As in the EU-Mexico Global Agreement, CETA includes rules on the use of information technology. According to Article 19.4, when conducting covered procurement by electronic means, a procuring entity shall ensure that the procurement is conducted using information technology systems and software, including those related to the authentication and encryption of information, that are generally available and interoperable with other generally available information technology systems and software, and maintain mechanisms that ensure the integrity of requests for participation and tenders, including establishment of the time of receipt and the prevention of inappropriate access. There are also special provisions on electronic auctions (Article 19.13).

3.2 Investment

1. EU-Mexico Global Agreement

The EU-Mexico Global Agreement does not include an investment chapter, and it only considers encouraging the progressive and reciprocal liberalisation of capital movements and payments (Articles 8 and 9) and obligations on investment promotion, as Parties shall help to create an attractive and stable environment for reciprocal investment (Article 15). Decision No. 2/2001 of the EU-Mexico Joint Council adopted measures to liberalise investment and related payments between the Parties (Title III, Articles 28 to 35).

In general terms, there are no investment provisions other than those related to payments and capital flows, since the coverage of investment promotion and protection provisions themselves is left to bilateral investment treaties (BITs) between Mexico and individual EU Member States.

By the end of the 1980s and early 1990s, many developing countries in Asia, Africa, and Latin America had entered into several BITs, with the aim of stimulating economic growth through FDI.[35] Although initially BITs were concluded in small numbers between developing and developed countries, this pattern changed in the 1990s, when economies in transition and developing countries started signing BITs among themselves and in large numbers.[36] In 1992, Chapter 11 of NAFTA became the first treaty regulating foreign investment that included two developed countries (Canada and the United States) and Mexico. After NAFTA, Mexico began to include investment chapters in certain preferential trade agreements (PTAs), and Mexico quickly joined the trend of negotiating BITs.

[35] Andrew T. Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38 Virginia Journal of International Law 639, 643-644.
[36] See: United Nations Conference on Trade and Development, *South-South Cooperation in International Investment Arrangements.* (United Nations 2005).

In that context, Mexico has signed 39 international investment agreements (IIA) including BITs and PTA investment chapters with the aim of promoting and protecting foreign investment. The majority were signed with European and Latin American countries:[37]

Table 1: Mexican International Investment Agreements [38]

	Parties	**Type**	**Date of Signature**	**Entry into Force**
	Bilateral Agreements			
1	Mexico – Argentina	BIT	13/11/1996	22/06/1998
2	Mexico – Australia	BIT	23/08/2005	21/07/2007
3	Mexico – Austria	BIT	29/06/1998	26/03/2001
4	Mexico – Belarus	BIT	04/09/2008	27/08/2009
5	Mexico - BLEU[39]	BIT	27/08/1998	14/03/2003
6	Mexico – Brazil[40]	CFIA	26/05/2015	----------
7	Mexico – Chile	FTA	17/04/1998	01/08/1999
8	Mexico – China	BIT	11/07/2008	06/06/2009
9	Mexico – Colombia [41]	FTA	13/06/1994	01/01/1995
10	Mexico – Cuba	BIT	30/05/2001	29/03/2002
11	Mexico - Czech Republic	BIT	04/04/2002	13/03/2004
12	Mexico – Denmark	BIT	13/04/2000	23/09/2000
13	Mexico – Finland	BIT	22/02/1999	30/08/2000
14	Mexico – France	BIT	12/11/1998	12/10/2000
15	Mexico – Germany	BIT	25/08/1998	23/02/2001
16	Mexico – Greece	BIT	30/11/2000	26/09/2002
17	Mexico – Haiti	BIT	07/05/2015	----------
18	Mexico – Iceland	BIT	24/06/2005	28/04/2006
19	Mexico – India	BIT	21/05/2007	23/02/2008
20	Mexico – Italy	BIT	24/11/1999	05/12/2002
21	Mexico – Japan	FTA	17/09/2004	01/04/2005
22	Mexico – Korea, Republic of	BIT	14/11/2000	27/06/2002
23	Mexico – Kuwait	BIT	22/02/2013	----------
24	Mexico – Netherlands	BIT	13/05/1998	01/10/1999
25	Mexico – Nicaragua	FTA	18/12/1997	01/07/1998

[37] Information available from SICE OAS, http://www.sice.oas.org/ctyindex/MEX/MEXagreements_e.asp

[38] An FTA with Mexico that included an investment chapter (signed on 10/09/1994, in force until 07/06/2010) was denunciated by Bolivia. A new FTA was concluded between both countries on 17/05/2010, in force since 07/06/2010, without an investment chapter.

[39] Belgium-Luxembourg Economic Union.

[40] Cooperation and Facilitation Investment Agreement (CFIA). The CFIA with Brazil is noteworthy especially because it does not include investor-state arbitration. Instead, this treaty creates mechanisms to prevent disputes. Under these objectives, States create focal points to support the investors of the other Party in its territory. In addition, a Joint Committee is established to facilitate the exchange of information between the Parties, strengthen mutual investment, and create mechanisms for interaction between the private sector and governments.

[41] Venezuela was also part of this FTA but denunciated the treaty on 22 May 2006, effective 19 November 2006, for both Mexico and Colombia.

26	Mexico - Panama [42]	BIT	11/10/2005	14/12/2006
27	Mexico – Peru	FTA	06/04/2011	01/02/2012
28	Mexico – Portugal	BIT	11/11/1999	04/09/2000
29	Mexico – Singapore	BIT	12/11/2009	03/04/2011
30	Mexico - Slovakia	BIT	26/10/2007	08/04/2009
31	Mexico - Spain [43]	BIT	10/10/2006	03/04/2008
32	Mexico - Sweden	BIT	03/10/2000	01/07/2001
33	Mexico - Switzerland	BIT	10/07/1995	14/03/1996
34	Mexico - Trinidad and Tobago	BIT	03/10/2006	16/09/2007
35	Mexico - United Kingdom	BIT	12/05/2006	25/07/2007
36	Mexico - Uruguay [44]	FTA	15/11/2003	15/07/2004
	Regional/Plurilateral Agreements			
1	North American Free Trade Agreement (NAFTA)[45]	FTA	17/12/1992	01/01/1994
2	Central America – Mexico FTA[46]	FTA	22/11/2011	01/09/2013
3	Pacific Alliance Protocol, Chapter 10[47]	FTA	10/02/2014	----------

Source: SICE OAS, http://www.sice.oas.org/ctyindex/MEX/MEXagreements_e.asp

Mexico has concluded BITs with 16 EU Member States: Austria, Belgium and Luxemburg, the Czech Republic, Denmark, Finland, France, Germany, Greece, Italy, the Netherlands, Portugal, Slovakia, Spain, Sweden, and the United Kingdom. These agreements closely follow the 'Dutch gold standard BIT',[48] being short treaties with broad definitions for investors and investment, relative standards (Most-Favoured Nation (MFN) and National Treatment (NT)), absolute standards (Fair and Equitable Treatment (FET) and full protection and security (FPS)), free transfer of funds in connection with an investment, full compensation for expropriation, umbrella clauses, no exceptions for special sectors, and investor-state dispute settlement provisions (recourse to local courts, and investor-state arbitration).

Table 2: Mexican Bilateral Investment Treaties with EU Member States

		Substantive Protections					**Procedural Rights**		
	Contracting Party	**Fair and Equitable Treatment**	**Expropriation**	**Protection and Security**	**Most-Favoured Nation**	**Umbrella Clause**	**Cooling-Off Period**	**Local Courts**	**Arbitration**
1	Austria	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes

[42] This treaty was replaced by an FTA between Mexico and Panama (signed 03/04/2014), not yet in force.
[43] This treaty replaced a previous BIT between Mexico and Spain (signed 23/06/1995, in force since 18/12/1996).
[44] This treaty replaced a previous BIT between Mexico and Uruguay (signed 30/06/1999, in force since 01/07/2002), although the previous BIT has not been formally terminated.
[45] NAFTA includes Canada, the United States, and Mexico.
[46] Central America includes the members of the Central American Common Market (CACM): Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua. This treaty also replaced a previous FTA between Mexico and Nicaragua (signed 18/12/1997, in force since 01/07/1998).
[47] The Pacific Alliance was established between Chile, Colombia, Peru, and Mexico in April 2011 and formalised by a framework agreement signed in Paranal, Chile, on 6 June 2012. Costa Rica is finishing up the process to be incorporated as the Alliance's fifth member, and Panama is an official candidate to the bloc. See Organization of American States, 'Pacific Alliance' <http://www.sice.oas.org/TPD/Pacific_Alliance/Pacific_Alliance_s.asp>.
[48] Nikos Lavranos, 'The New EU Investment Treaties: Convergence towards the NAFTA Model as the New Plurilateral Model BIT Text?' (Social Science Research Network 2013) SSRN Scholarly Paper ID 2241455 1 <http://papers.ssrn.com/abstract=2241455> accessed 15 January 2014.

2	Belgium	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
3	Czech Republic	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
4	Denmark	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
5	Finland	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
6	France	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
7	Germany	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
8	Greece	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
9	Italy	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
10	Netherlands	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
11	Portugal	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
12	Spain	Yes	Yes	Yes	Yes	Yes	6 months	No	Yes
13	Slovakia	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
14	Sweden	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
15	United Kingdom	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes

Source: Global Arbitration Review[49]

2. CETA

Investment provisions in the EU-Canada Free Trade Agreement are found in Chapter 8 of CETA. According to the European Commission, CETA's investment chapter reflects a 'turning point' in the European approach to investment policy, claiming that it is the first agreement that 'puts all EU investors on the same, equal footing' and 'introduces important innovations to investment protection', ensuring a high level of investment protection while preserving the right to regulate and pursue legitimate public policy objectives (such as the protection of health, safety, or the environment). In addition, by the end of 2014, the European Commission has claimed that CETA is the most progressive system established for Investor-to-State Dispute Settlement (ISDS).[50]

Although these affirmations could be contrasted with other equally important innovations found in recent IIAs concluded by both Mexico and the EU with other countries (as will be addressed in Section 4 of this report), and one may claim that EU investors will never be on equal footing as long as EU Member States' BITs are not terminated, there are still several differences between CETA's investment chapter and the BITs previously concluded between Mexico and EU Member States:

- **Scope of application**: To be qualified as an investor, an enterprise must have 'substantial business activities' in the territory of the host State.[51] Thus, CETA does not protect 'shell' or 'mailbox' companies.[52] Furthermore, while Mexican BITs with EU Member States are limited to post-establishment protection, CETA also protects 'pre-establishment' (market access) in a similar way to NAFTA, as the definition of

[49] Marco Tulio Venegas, 'Investment Treaty Arbitration Comparison - Mexico' (18 September 2015) <http://globalarbitrationreview.com/know-how/topics/66/jurisdictions/16/mexico/> accessed 28 January 2016.
[50] European Commission, 'Investment Provisions in the EU-Canada Free Trade Agreement (CETA)' (26 September 2014) <http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf> accessed 1 February 2016.
[51] CETA, Article 8.1.
[52] European Commission, 'Investment Provisions in the EU-Canada Free Trade Agreement (CETA)' (n 50) 3.

investor includes a natural person or an enterprise that 'seeks to make, is making, or has made an investment in the territory of the other Party'.[53] However, CETA does not allow ISDS claims based on market access restrictions.[54]

  - Mexican BITs with EU Member States include broad definitions of the term 'investor', and only a few (the treaty with Germany) do not provide such a definition. There is no specific rule regarding the seat of the investor or place of business, and definitions are focused either on the investment made by a Contracting Party, or the investor's place of substantive business. The BIT signed with Greece follows both criteria. Mexican BITs with EU Member States traditionally provide protection only after establishment. There is no general rule on the duration of the investment, and only the BIT with Denmark contains a specific provision in this regard, by stating in its Article 1(1) that the BIT covers only those investments that have the purpose of establishing lasting economic relations with an enterprise.[55]

- **Establishment of investments**: CETA's investment chapter includes provisions that restrict limitations on both market access (Article 8.4) and performance requirements (Article 8.5), which are not found in current Mexican BITs with EU Member States.[56]

- **Standards of treatment**:
  - Most-favoured nation (MFN): CETA restricts the scope of the MFN provision to substantive standards, specifically to treatment no less favourable accorded in like situations, to investors and to their investments of any third country with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment, and sale or disposal of their investments in its territory.[57] It is explicitly excluded to 'import' and use in the dispute settlement procedures the substantive provisions from other agreements that investors consider to be more advantageous to their interests.[58] Both restrictions are not found in existing Mexican BITs with EU Member States.
  - Fair and equitable treatment (FET): All Mexican BITs with EU Member States provide that each Contracting Party shall accord fair and equitable treatment to investments. However, none of them define this standard, which has become the most frequent basis for ISDS claims.[59] In contrast, CETA provides a list of conducts that breach the FET standard, and aims at not having a 'minimum' standard or an 'evolving concept', but a closed text that precisely

[53] CETA, Article 8.1.
[54] Peter Fuchs, 'Investment' in Scott Sinclair, Stuart Trew and Hadrian Mertins-Kirkwood (eds), *Making Sense of the CETA* (Canadian Centre for Policy Alternatives 2014) 18 <https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2014/09/making_sense_of_the_ceta_INVESTMENT_0.pdf> accessed 3 February 2016.
[55] Only a few Mexican BITs do not provide the definition of 'investor', such as the treaty signed with Germany. There is no specific rule regarding the seat of the investor/place of business, and definitions are focused either on the investment made by a Contracting Party, or the investors' place of its substantive business. However, the BIT signed with Greece follows both criteria. There is also no general rule on the duration of the investments, and only the BIT with Denmark contains a specific provision in this regard, by stating in its Article 1(1) that the BIT covers only those investments that have the purpose of establishing lasting economic relations with an enterprise. Marco Tulio Venegas (n 49).
[56] BITs with EU Member States do not cover 'first establishment' or market access. However, they could cover 'performance requirements' post-establishment, but they do not. It must be recalled that performance requirements are covered by the Agreement on Trade-Related Investment Measures (TRIMs), included in Annex 1A of the WTO agreement.
[57] CETA, Article 8.7.
[58] European Commission, 'Investment Provisions in the EU-Canada Free Trade Agreement (CETA)' (n 50) 3.
[59] United Nations Conference on Trade and Development, *Fair and Equitable Treatment: A Sequel* (United Nations 2012) 10.

defines the standard of treatment.[60] Both the EU and Canada must agree to review the standard for it to be revisited.

- Although the purpose of this provision is evidently to limit 'unwelcomed' discretion by ISDS arbitrators,[61] its effective implementation will nevertheless be in the hands of those arbitral tribunals. In fact, CETA acknowledges that when applying the FET obligation, a tribunal *may* take into account 'whether a Party made a specific representation to an investor to induce a covered investment, that created a **legitimate expectation**, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated'.[62]

- **Standards of protection**: For the first time in an EU agreement, CETA defines what constitutes 'indirect expropriation', which can only occur when the investor is substantially deprived of the fundamental attributes of property, such as the right to use, enjoy, and dispose of the investment. This feature is a first for an EU agreement, but basically continues the United States' initiative in its agreement with Central America and the Dominican Republic (DR–CAFTA), Annex 10 – C (4) (a). A case-by-case analysis is introduced to determine whether an indirect expropriation has taken place. For example, the sole fact that a measure increases costs for investors does not itself give rise to a finding of expropriation. Similarly, the issuance of compulsory licences in accordance with WTO provisions guaranteeing access to medicines cannot be considered an expropriation.[63] In order to avoid ISDS claims against legitimate public policy, non-discriminatory measures designed and applied to protect health and safety are not considered indirect expropriation, except in the rare cases where they are manifestly excessive in light of their objectives.[64]
    - In contrast, all Mexican BITs with EU Member States do not define indirect expropriation, and just contemplate the act of expropriating under the term 'expropriation'. Some agreements, such as the BITs signed with Spain and Greece, contemplate 'nationalisation' as expropriation. Most of the Mexican BITs do not consider interest paid and resulting from an expropriation as part of the compensation, with some exceptions such as the BITs with Greece and France.[65] CETA also considers interest at a normal commercial rate from the date of expropriation until the date of payment.[66]

- **Investor-state dispute settlement (ISDS)**: Originally, CETA's investment chapter included several provisions to 'improve' investor-state arbitration that are largely not considered in existing Mexican BITs with EU Member States. However, in latest revised or 'scrubbed' version of the agreement (29 February 2016), an important change was made and now the chapter includes the establishment of an

[60] According to CETA, Article 8.9, a Party breaches the obligation of fair and equitable treatment where a measure or series of measures constitutes:
- Denial of justice in criminal, civil, or administrative proceedings;
- Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;
- Manifest arbitrariness;
- Targeted discrimination on manifestly wrongful grounds, such as gender, race, or religious belief;
- Abusive treatment of investors, such as coercion, duress, and harassment; or
- A breach of any further elements of the fair and equitable treatment obligation adopted by the Parties

[61] European Commission, 'Investment Provisions in the EU-Canada Free Trade Agreement (CETA)' (n 50) 1–2.
[62] CETA, Article 8.9.
[63] European Commission, 'Investment Provisions in the EU-Canada Free Trade Agreement (CETA)' (n 50) 2.
[64] CETA, Article 8.11 and Annex 8.11.
[65] Marco Tulio Venegas (n 49).
[66] CETA, Article 8.11.

investment court for the resolution of disputes between investors and states (CETA Chapter 8, Section F), abandoning the previous system of investor-state arbitration.

- Alternative dispute resolution: CETA includes specific provisions on mediation (Article 8.20) and on consultations to encourage an amicable solution (Article 8.19). Although a 'cooling-off' phase is common in Mexican BITs with EU Member States, there are no special rules on mediation.
- Issues of scope: CETA includes several provisions limiting the access to ISDS that are not included in Mexican BITs with EU Member States.
  - ***Only specific claims can be brought to arbitration.*** These claims relate to non-discriminatory treatment (CETA Chapter 8, Section C, with respect to the expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of a covered investment) and investment protection (CETA Chapter 8, Section D). In the financial services field, a specific filter mechanism is established to ensure the Parties can take legitimate prudential measures, as also enshrined in the prudential carve-out (CETA, Articles 13.16 and 13.21). Punitive damages are explicitly excluded (CETA, Article 8.39.4). Parties have reaffirmed their right to regulate and the mere fact that modify its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, does not amount to a breach of an obligation under the treaty (CETA, Article 8.9)
  - ***CETA includes rules to prevent fraudulent or manipulative claims***. An investor may not submit a claim when the investment was made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process (CETA, Article 8.18.3).
  - ***CETA introduces statutory limits to bring an ISDS claim***. This limit is three years, which can be extended if a domestic court proceeding is pursued (two years after the investor exhausts or ceases to pursue claims or proceedings and, in any event, no later than 10 years).[67]
- Regulation of proceedings:
  - ***CETA includes a binding code of conduct for members of investment the investment tribunal and the appellate tribunal***. This is based on the ethical rules of the International Bar Association. (CETA, Article 8.30). There are no similar provisions in Mexican BITs with EU Member States.
  - ***CETA introduces a higher level of transparency of proceedings.*** Following UNCITRAL Transparency Rules,[68] almost all documents will be publicly available on a website, including submissions by the Parties and decisions of the tribunal. All hearings will be open to the public, and interested parties (e.g. NGOs, trade unions, and business associations) will be able to make submissions.[69] There are no similar provisions in Mexican BITs with EU Member States, but several Mexican IIAs include them, like NAFTA.

[67] CETA, Article 8.19.6.
[68] United Nations Commission on International Trade Law (UNCITRAL), 'Rules on Transparency in Treaty-Based Investor-State Arbitration and Arbitration Rules (with New Article 1, Paragraph 4 as Adopted in 2013). UN Doc. A/RES/68/462' <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html> accessed 14 October 2014.
[69] CETA, Art. 8.36.

- ***CETA explicitly prohibits parallel proceedings***. Investors cannot simultaneously seek remedies in the investment court and under another international agreement, in order to avoid divergent awards or overlapping compensation (CETA, Article 8.24). Some of the BITs signed by Mexico with EU Member States contain 'fork-in-the-road' provisions (e.g. the treaties with Spain, Germany, and Greece). According to these treaties, investors must opt to either pursue their claim through the local courts or by means of international arbitration.[70]
- ***Expedited system to reject unfounded or frivolous claims***. Frivolous claims (those without legal merit) and those without legal basis can be quickly thrown out by the arbitral tribunal as preliminary questions, before deciding on the merits of the case (CETA, Articles 8.32 and 8.33). There are no similar provisions in Mexican BITs with EU Member States.
- ***Losing Party pays costs***. Under the large majority of IIAs, there are no clear rules regarding the costs determined by the arbitrators (CETA, Article 8.39.5). This is the first investment treaty with such provisions, and is aimed at preventing a government from bearing all of the costs even if it has successfully defended itself in arbitration.[71]
- ***Appellate Tribunal.*** Following a similar provision contained in the IIAs concluded by the United States, CETA originally provided only for the possible creation of an Appeal Mechanism (CETA, Article X.42).[72] There are no similar provisions in Mexican BITs with EU Member States. However, in the recent 'scrubbed' text of CETA, a major change to this issue was included. Now the treaty in Article 8.28 explicitly establishes an Appellate Tribunal, which may uphold, modify, or reverse an arbitral tribunal's award based on: (a) errors in the application or interpretation of applicable law; (b) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law; and (c) the grounds set out in Article 52(1) (a) through (e) of the International Centre for Settlement of Investment Disputes (ICSID) Convention, in so far as they are not covered by paragraphs (a) and (b).[73] Another important point in this new draft is that the Appellate Tribunal might also be able to remand the case to the arbitral tribunal, if the CETA Joint Committee adopts a decision regarding the functioning of the Appellate Tribunal that 'includes procedures for referring issues back to the Tribunal for adjustment of the award' (Article 8.27).[74]

o Control by the Parties: Also following NAFTA's template, CETA's investment chapter stipulates that the contracting Parties have the right to adopt binding interpretations and to make submissions when they are not defendants ('non-disputing Party submissions').[75] The

[70] Marco Tulio Venegas (n 49).
[71] European Commission, 'Investment Provisions in the EU-Canada Free Trade Agreement (CETA)' (n 50) 6.
[72] This is in line with the European Commission's Communication of 2010. European Commission, 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions Towards a Comprehensive European International Investment Policy' (7 July 2010) <http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf> accessed 3 February 2016.
[73] Article 52(1) of the ICSID Convention provides that either party may request annulment of the award on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.
[74] Simon Lester, 'The New Investment Appellate Court Will Have Remand' (*International Economic Law and Policy Blog*, 2 March 2016) <http://worldtradelaw.typepad.com/> accessed 3 March 2016.
[75] CETA, Articles 8.31 and 8.38.

same chapter also states that the arbitral tribunal may only award monetary damages or restitution in property and, therefore, a decision by the tribunal cannot lead to the repeal of a measure adopted by the EU Parliament, a Member State, or Canada (CETA, Article 8.39). This restriction is not found in Mexican BITs with EU Member States.

3.3 Regulatory cooperation

1. EU-Mexico Global Agreement

The EU-Mexico Global Agreement does not include special provisions on regulatory cooperation beyond soft commitments about exchanges of information on financial regulations (Article 16), cooperation on technical regulations and conformity assessment (Article 18), and a dialogue on regulatory cooperation concerning international on-line services (Article 20.2(g)).

2. CETA

The recently concluded CETA features a dedicated chapter on regulatory cooperation (Chapter 21).[76] This is presented as a first in preferential trade agreements, but this assertion is inaccurate. For example, the EEA agreement is an agreement of (and not on) regulatory cooperation. To a lesser extent, this is also the case with the so-called EU's 'Europe agreements' with Central and Eastern European countries before they acceded to the Union and the agreement with Turkey, where a substantial amount of regulatory cooperation occurs.

The goals of this new chapter include promoting good regulatory practices and reducing differences through the facilitation of joint initiatives (including data collection and analysis, regulatory impact analyses, and regulatory proposals, among others), joint high-level dialogue on regulatory matters, and specific sectoral cooperation initiatives dealing with consumer safety.[77]

The chapter begins by explicitly incorporating relevant WTO provisions, with both Parties affirming their rights and obligations under the agreements on technical barriers to trade (TBTs) and sanitary and phytosanitary (SPS) measures, the General Agreement on Tariffs and Trade (GATT 1994), and the General Agreement on Trade in Services (GATS), while also committing themselves to ensuring high levels of protection for human, animal, and plant life or health.

Yet, the limitations of the CETA approach to regulatory convergence become readily apparent in spite of its impressive appearance and the length and complexity of its provisions. Although the chapter replaces the Canada–EC Framework on Regulatory Cooperation and Transparency,[78] CETA does not prescribe a change in the nature of regulatory cooperation between both Parties, which still remains a voluntary undertaking through which neither Party is obliged to enter into particular regulatory cooperation activities or prevented from withdrawing cooperation. Additionally, the Parties will engage in regulatory cooperation only if it does not limit their ability to carry out their regulatory, legislative, and policy activities.[79] **In other words, CETA does not stipulate harmonising regulation or creating a mechanism to produce 'CETA secondary law' on regulatory standards**. Any new regulatory provisions

[76] European Commission - Directorate General for Trade, 'Consolidated CETA Text, 26 September 2014' (*TDM Journal (Transnational Dispute Management)*, 26 September 2014) Chapter 26 <http://www.transnational-dispute-management.com/journal-advance-publication-article.asp?key=544> accessed 21 October 2014.
[77] Debra P. Steger, 'CETA – A New Model for Regulatory Cooperation, Transparency and Coherence?' (6 May 2014) <http://slideplayer.com/slide/2411068/> accessed 23 June 2015.
[78] Government of Canada - European Commission, 'Framework on Regulatory Co-Operation and Transparency' (*Global Affairs Canada - Regional and Bilateral Initiatives*, 31 July 2002) <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/eu-framework.aspx?lang=eng> accessed 5 February 2016.
[79] CETA, Article 21.2.

must be the objective of independent agreements (which could be equally arrived at if CETA did not exist).

Where both CETA Parties will agree to a regulatory cooperation scheme, there are clearly defined objectives such as: contributing to the protection of human life, health, or safety, animal or plant life or health, and the environment; building trust, deepening mutual understanding of regulatory governance, and obtaining from each other the benefit of expertise and different perspectives; facilitating bilateral trade and investment; and contributing to the improvement of competitiveness and industrial efficiency.[80]

Within the above context, a wide range of regulatory cooperation activities is considered. These include:[81]

- Preventing and eliminating unnecessary barriers to trade and investment, through on-going bilateral discussions on regulatory governance;
- Enhancing the climate for competitiveness and innovation, including through the pursuit of regulatory compatibility, the recognition of equivalence, and convergence; and
- Promoting transparent, efficient, and effective regulatory processes that better support public policy objectives and fulfil the mandates of regulatory bodies, including through the promotion of information exchanges and the enhanced use of best practices.

Whenever practicable and mutually beneficial, the Parties shall endeavour to approach regulatory cooperation in a way that is open to participation by other international trading partners.[82] However, the focus seems to be on substantive convergence, as seen from the fact that the Parties may examine opportunities to minimise unnecessary divergences in regulations through means such as conducting concurrent or joint risk assessments and regulatory impact assessments, and achieving harmonised, equivalent, or compatible solutions. The use of mutual recognition is only considered in specific cases.[83]

While CETA does not provide for general regulatory harmonisation with a view to enhancing convergence and compatibility between the regulatory measures of the Parties, both sides shall, when appropriate, consider the regulatory measures or initiatives of the other Party on the same or related topics. This consideration does not prevent either Party from adopting differing measures or pursuing differing approaches, for reasons that include varying institutional and legislative approaches, circumstances, values, or priorities.[84]

Conversely, CETA makes conformity assessment easier, providing for the mutual recognition of 'accredited' conformity assessment bodies of Canada and the EU, the acceptance of its test results and product certification, and procedures for requesting the mutual recognition of technical regulations. To avoid any misunderstanding, it must be emphasised that this does not mean 'recognising norms', but rather recognising 'assessments of conformity to the norms applicable in Party A by a body of country B.' Therefore, this is much more an issue of 'trade facilitation' than an issue of 'regulatory convergence'.

CETA deals with this topic in its Chapter 21 on regulatory cooperation, in the special Protocol on the Mutual Acceptance of the Results of Conformity Assessment, and in the Protocol on the Mutual Recognition of the Compliance and Enforcement Program regarding Good Manufacturing Practices

[80] CETA, Article 21.3.
[81] CETA, Article 21.2.4.
[82] CETA, Article 21.2.3.
[83] CETA, Article 21.4.(g).
[84] CETA, Article 21.5.

(GMP) for Pharmaceutical Products. However, it bears noting that beyond pharmaceuticals, the current list of products that stands to benefit from the above mutual acceptance procedure is rather limited,[85] although there is a list of priority categories of goods for future consideration.[86] The Protocol also features several exclusions, notably where a Party has delegated exclusive authority to a single non-governmental body to assess the conformity of goods with that Party's technical regulations, in regard to purchasing specifications prepared by a governmental body for production or consumption requirements of that body; for SPS measures; for certain activities performed by bodies on behalf of market or post-market surveillance; for agricultural products; for the assessment of aviation safety; as well as for the statutory inspection and certification of vessels other than recreational craft.[87]

Another CETA chapter provides a framework to facilitate mutual recognition agreements (MRAs) for professional qualifications.[88] For this purpose, a joint committee responsible for the implementation of that mechanism will be established after the entry into force of the agreement, and a set of non-binding guidelines for MRAs on professional qualifications have been included in the treaty. The EU foresees early advances in specific areas of architecture and engineering services.[89]

CETA also creates a forum for cooperation between regulators. The Regulatory Cooperation Forum (RCF) shall be established to facilitate and promote regulatory cooperation, providing a setting for the discussion of regulatory policy issues of mutual interest to the Parties, assisting individual regulators in identifying potential partners for cooperation activities, reviewing regulatory initiatives, and generally encouraging the development of bilateral cooperation activities.[90]

Besides this institutional dimension, the chapter sets up tools for dialogue by standard-setting agencies and government officials in a host of regulatory areas. Further cooperation of the Parties is also considered, especially with respect to the monitoring of forthcoming regulatory projects and the identification of opportunities for regulatory cooperation. For that purpose, both Parties shall periodically exchange information of on-going or planned regulatory projects in their areas of responsibility. However, cooperation seems to be restricted or even foreclosed in certain areas such as food safety, which is explicitly excluded from voluntary activities of cooperation and information sharing.[91]

In seeking civil society perspectives on the implementation of CETA, the Parties are allowed to jointly or separately consult with relevant stakeholders and interested Parties, including representatives from

[85] Product coverage currently includes: electrical and electronic equipment, including electrical installations and appliances and related components; radio and telecommunications terminal equipment; electromagnetic compatibility (EMC); toys; construction products; machinery, including parts and components, including safety components, interchangeable equipment, and assemblies of machines; measuring instruments; hot-water boilers, including related appliances; equipment, machines, apparatus, devices, control components, protection systems, safety devices, controlling devices and regulating devices, and related instrumentation, and prevention and detection systems for use in potentially explosive atmospheres (ATEX equipment); equipment for use outdoors as it relates to noise emission in the environment; and recreational craft, including their components.

[86] This list includes: medical devices including accessories; pressure equipment, including vessels, piping, accessories, and assemblies; appliances burning gaseous fuels, including related fittings; personal protective equipment; rail systems, subsystems, and interoperability constituents; and equipment placed on board of a ship.

[87] CETA, Protocol on the Mutual Acceptance of the Results of Conformity Assessment, Article 1.5.

[88] CETA, Chapter 11, Mutual Recognition of Professional Qualifications.

[89] Cecilia Malmström, 'Trade in the 21st Century: The Challenge of Regulatory Convergence' (*European Commission - Trade*, 19 March 2015) 4 <http://trade.ec.europa.eu/doclib/docs/2015/march/tradoc_153260.pdf> accessed 22 June 2015.

[90] According to CETA, Article 21.6, the RCF shall be co-chaired by a senior representative of the Government of Canada at the level of a Deputy Minister, equivalent or designate, and a senior representative of the European Commission at the level of a Director General, equivalent or designate, and shall comprise relevant officials of each Party.

[91] CETA, Article 21.7.3.

academia, think tanks, non-governmental organisations, and business, consumer, and other organisations, by any means the Parties deem appropriate.[92]

3.4 Sustainable development and other related issues

1. EU-Mexico Global Agreement

There is no separate chapter on sustainable development, and environmental and labour issues are only mentioned in the articles on cooperation (all of them empty of any effective content as they do not impose any legal obligation and are not, and cannot be, a 'legal base' for EU activities[93]).

The EU-Mexico arrangements neither consider obligations to enforce labour or environmental legislation contained in international instruments (like multilateral environmental agreements (MEAs) or International Labour Organization (ILO) conventions), nor promote good practices in both areas (like corporate social responsibility (CSR) or sustainability assurance schemes). This situation is in stark contrast to the obligations of both the EU and Mexico in comparable agreements with other trading partners.

Besides a statement in the preamble of the agreement on the importance that both Parties attach to the proper implementation of the principle of sustainable development (as agreed and set out in Agenda 21 of the 1992 Rio Declaration on Environment and Development), Article 34 of the Global Agreement is the sole provision dealing with these issues, and it merely considers activities of cooperation on the environment and natural resources at a general and sectoral level.[94]

According to some of the interviews conducted for this research, cooperation activities on environmental issues between the EU and Mexico are largely unknown by Mexican civil society and academia, aside from some research financed by the EU on topics like climate change, biodiversity, and renewable energies,[95] and mutual dialogue at the political level.[96]

There are no specific commitments on labour issues in the EU-Mexico Global Agreement, and only a brief mention of the final Declaration of the World Summit for Social Development (Copenhagen, March 1995) is found in the preamble. However, it is important to notice that Mexico has ratified seven out of eight fundamental ILO conventions, with the exception of the Right to Organise and Collective Bargaining Convention (No. 98).

2. CETA

Sustainable development is significantly established in CETA, with a dedicated chapter on trade and sustainable development (Chapter 22). The relation of trade with the environment and labour are also discussed in separate chapters (Chapters 23 on labour, and 24 on environment). These provisions mostly follow the evolution of FTAs, which now contain explicit references to international and multilateral

[92] CETA, Article 21.7.8.
[93] See on this, also, Ramón Torrent, 'Las Relaciones Unión Europea–América Latina En Los últimos Diez Años' (n 9).
[94] Cooperation may include activities to prevent degradation of the environment; to promote the conservation and sustainable management of natural resources; to develop, spread, and exchange information and experience on environmental legislation; to stimulate the use of economic incentives to promote compliance; to strengthen environmental management at all levels of government; to promote the training of human resources, education in environmental topics, and the execution of joint research projects; and to develop channels for social participation.
[95] Marie-Anne Coninsx, 'La Cooperación Unión Europea-México Herramientas Para Un Mejor Futuro' (September 2011) 6 <http://eeas.europa.eu/delegations/mexico/documents/projects/folleto_cooperacion_2011_es.pdf> accessed 3 February 2016.
[96] 'México y UE Fortalecen Cooperación en Materia Ambiental' *America Economia* (17 February 2013) <http://www.americaeconomia.com/politica-sociedad/politica/mexico-y-ue-fortalecen-cooperacion-en-materia-ambiental> accessed 3 February 2016.

commitments.[97] These chapters follow much of the structure and language of the 2012 agreement concluded by the EU with Colombia and Peru.[98]

- **Sustainable Development**: The Parties stress the importance of ensuring transparency as a necessary element to promote public participation and information on sustainable development. The Parties also emphasise dialogue and consultations with each other regarding trade-related sustainable development issues of common interest. At the same time, voluntary best practices of corporate social responsibility by enterprises are encouraged, such as those embodied in the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multilateral Enterprises, to strengthen coherence between economic, social, and environmental objectives.[99]

  In this context, CETA creates two distinctive pieces of institutional infrastructure to foster transparency, cooperation, and engagement with stakeholders: a) an as-yet unnamed body, composed of high-level officials that will meet on an ad hoc basis to review the implementation of the sustainable development, environment, and labour chapters; and b) a 'Civil Society Forum' that will meet annually to discuss sustainable development aspects of the agreement. This is complemented with a self-review and monitor mechanism, or even joint assessments to evaluate the impact of CETA's implementation on sustainable development in each territory.[100]

- **Environment**: The Parties recognise that the environment is a fundamental pillar of sustainable development and that trade could contribute to sustainable development.[101] At the same time, there is recognition of the right of each Party to set its own environmental priorities and to establish its own domestic levels of environmental protection,[102] and exceptions are given to protect human, animal, or plant life or health, similar to those in GATT and GATS. However, when preparing and implementing measures aimed at environmental protection that may affect trade or investment between the Parties, each Party shall take into account relevant scientific and technical information, and related international standards, guidelines, or recommendations.[103]

  Currently, CETA includes fairly standard references to international treaties and principles,[104] including collaboration on the implementation of MEAs (Article 24.4), cooperation on environmental issues in general, and in specific areas of forest products (Article 24.10) and fisheries (Article 24.11), and an elaboration on the precautionary principle–but without using that name (Article 24.8). Certain provisions are particularly noteworthy because of their relative novelty in the context of trade agreements:

    - Rights and obligations relating to water are included in the text, such as the recognition that each Party has the right to protect and preserve its natural water resources, and that water in

[97] Lina Lorenzoni Escobar, 'Sustainable Development and International Investment: A Legal Analysis of the EU's Policy from FTAs to CETA' (2015) 136 Beiträge zum Transnationalen Wirtschaftsrecht, Heft 46 <http://telc.jura.uni-halle.de/sites/default/files/BeitraegeTWR/Heft%20136.pdf> accessed 3 February 2016.
[98] Aaron Cosbey, 'Inside CETA: Unpacking the EU-Canada Free Trade Deal' (*International Centre for Trade and Sustainable Development*, 3 November 2014) <http://www.ictsd.org/bridges-news/biores/news/inside-ceta-unpacking-the-eu-canada-free-trade-deal> accessed 3 February 2016.
[99] CETA, Article 22.3.
[100] Aaron Cosbey (n 100).
[101] CETA Articles 22.1, 22.3, and 24.9.
[102] CETA, Article 24.3.
[103] CETA, Art. 24.8.1.
[104] Examples include the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Rio Declaration on Environment and Development of 1992, the Agenda 21 on Environment and Development, and the Johannesburg Declaration and Plan of Implementation of 2002 on Sustainable Development.

its natural state is not a good or a product and is outside the scope of the agreement (Chapter 1, Article 1.9);

- Measures seeking to ensure the conservation and protection of natural resources and the environment, including limitations on the availability, number, and scope of concessions granted, and the imposition of moratoria or bans, are considered permissible market access restrictions (Chapter 8, Article 8.4.2); and
- The Parties recognise that it is not appropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in domestic environmental laws (Chapter 24, Article 24.5). In contrast to the obligations in the trade and environment chapter that are best-effort pledges, the commitment not to lower environmental standards is explicitly binding ('shall not').

- **Labour**: Recognising the right of each Party to set its labour priorities and to establish its levels of labour protection, CETA includes in Chapter 23 fairly standard obligations in the sense that domestic law should respect ILO core principles and that the Parties should promote the objectives of the Decent Work Agenda.[105] However, it is noteworthy that there is no mention of indigenous peoples or a human rights and restrictive actions clause.[106]

  Similarly to the trade and environment chapter, there is a binding commitment of the Parties to recognise that it is not appropriate to encourage trade or investment by lowering the levels of protection embodied in domestic labour law and standards.[107]

However, these commitments do not impose new obligations on the Parties beyond their existing international obligations, nor are disagreements between the Parties on implementation of the trade and environment or the trade and labour chapters subject to the normal CETA dispute settlement procedures. Regarding these issues, the Parties have recourse to special rules and procedures that include governmental consultations and the composition of a panel of experts that can issue a non-binding report about whether there is a breach of these commitments. In contrast to NAFTA's environmental side agreement, where the procedure to assess whether a contracting state has failed to effectively enforce its environmental law can be initiated by civil society (non-governmental organisations or enterprises), CETA procedures in this area can only be triggered by governments. However, as in NAFTA, sanctions are limited to 'naming and shaming' in practice.[108] Implementing the recommendations of a Panel of Experts that determines there has been non-conformity with the trade and environment or the trade and labour chapter is ultimately left to the mutual agreement of the Parties.[109]

3.5 Other areas where the level of ambition of the existing EU- Mexico Global Agreement can be increased

Other areas that are not covered fully or at all in the current EU agreement with Mexico, but that are now included in EU FTAs, are general intellectual property rights (IPRs), geographic indications (GIs), SPS measures, and TBTs.

[105] 2006 Ministerial declaration of the UN Economic and Social Council on Full Employment and Decent Work, and the 2008 ILO Declaration on Social Justice for Fair Globalisation.
[106] Lina Lorenzoni Escobar (n 99) 46.
[107] CETA, Article 23.4.
[108] Aaron Cosbey (n 100).
[109] CETA Chapter 23, Articles 23.9 – 23.11, and CETA Chapter 24, Articles 24.14 – 24.16.

Article 12 of the 1997 EU–Mexico Global Agreement included GIs in the protection of IPRs, and the Parties committed to establishing the appropriate measures to ensure adequate and effective protection in accordance with the highest international standards, including effective means to enforce such rights. To this effect, the Joint Council established a Special Committee on Intellectual Property Matters comprised of representatives from the Parties, to essentially act as a consultation mechanism to reach mutually satisfactory solutions for difficulties in the protection of intellectual property.[110]

Both Parties confirmed their obligations arising from multilateral conventions on intellectual property, like the WTO's 1994 Agreement on TRIPs, the International Convention for the Protection of New Varieties of Plants (UPOV, 1978 and 1991), the 1971 Berne Convention for the Protection of Literary and Artistic Works, the Patent Cooperation Treaty (1970, amended in 1979 and 1984), the 1967 Paris Convention for the Protection of Industrial Property, and the 1961 International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organisations.[111] The Parties also undertook the commitment to accede to the Nice Agreement concerning the International Classification of Goods and Services for the purposes of the Registration of Marks (1977, amended in 1979), the Budapest Treaty of the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure (1977, modified in 1980), the 1996 World Intellectual Property Organization (WIPO) Copyright Treaty (WCT), and the 1996 WIPO Performances and Phonogram Treaty (WPPT).[112] Regarding GIs, it is important to highlight that Mexico and EU Member States are contracting Parties to the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration.

However, the abovementioned commitments do not include specific provisions beyond the multilateral conventions on IPRs mentioned. Unlike NAFTA, no provisions on the control of abusive or anti-competitive practices, the enforcement of intellectual property rights, or the procedural and remedial aspects of civil and administrative procedures are included in the EU–Mexico Global Agreement.[113] In CETA, Canada and the EU agreed to extend the *sui generis* protection of patents for pharmaceuticals for a period of two to five years, to be established by each Party.[114] CETA also includes provisions that extend the periods of data protection for pharmaceutical and plant protection products beyond TRIPs (and NAFTA), which only require five-year terms of data protection.[115]

Under the EU–Mexico Global Agreement, SPS measures and TBTs are governed by WTO Agreements, supplemented only by a framework for bilateral cooperation in Articles 19 and 20 of the Joint Council Decision 2/2000, which are far less detailed with respect to SPS measures than with respect to standards and technical regulations.[116]

In contrast, CETA represents one of the most ambitious WTO-plus regimes for SPS measures and TBTs, with relatively extensive provisions on mutual recognition, equivalence, and transparency.[117] The CETA chapter on SPS measures (Chapter 7) goes beyond WTO agreements, providing a full scope framework for cooperation on animal health, plant health, and food safety, and a more proactive procedure to

[110] Joint Council Decision 2/2000, Article 40. See WIPO Administered Treaties <http://www.wipo.int/treaties/en/> accessed 28 February 2016.
[111] Joint Council Decision 2/2001, Article 36.
[112] Mexico had already acceded to all these treaties by December 2002.
[113] ECORYS (n 2) 27.
[114] CETA Chapter 22, Article 9.2.
[115] Scott Sinclair, Marc-André Gagnon, and Joel Lexchin, 'Intellectual Property Rights - Pharmaceuticals' in Scott Sinclair, Stuart Trew, and Hadrian Mertins-Kirkwood (eds.), *Making Sense of the CETA* (Canadian Centre for Policy Alternatives 2014) 59. <https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2014/09/making_sense_of_the_ceta_INTELLECTUALPROPERTYRIGHTS.pdf> accessed 29 February 2016.
[116] Bradly J. Condon (n 3) 92.
[117] Gonzalo Villalta Puig and Eric D Dalke, 'Nature and Enforceability of WTO-plus SPS and TBT Provisions in Canada's PTAs: From NAFTA to CETA' (2016) 15 World Trade Review 51, 54.

determine the equivalency of a Party's inspection and certification systems, if the exporting Party objectively demonstrates to the importing Party that its measure achieves the importing Party's appropriate level of protection. Annex V of this chapter sets out several areas where this is already recognised, updating the Canada-EU Veterinary Agreement. Finally, an SPS Committee is established to discuss outstanding issues before they become problems,[118] something that is also considered with respect to TBTs.[119]

CETA directly incorporates a number of provisions of the TBT Agreement, and includes them in the TBT chapter (Chapter 6). Furthermore, dispute resolution under CETA is available for many of these provisions. Several TBT provisions have WTO-plus aspects: in addition to a general provision to encourage Parties to strengthen cooperation in a number of areas and an extensive section on transparency issues, the TBT chapter contains provisions on equivalence that require the Parties to share information about the development of equivalent or similar technical regulations. It also specifies a more complete procedure for the recognition of equivalence and cooperation on equivalence issues that in the WTO.[120] CETA also contains provisions that promote harmonisation in the field of motor vehicles[121] and mutual recognition of conformity assessments with respect to pharmaceutical products.[122]

[118] Debra P. Steger (n 78).
[119] CETA, Chapter 6, Article 8.
[120] Gonzalo Villalta Puig and Eric D Dalke (n 118) 68-69.
[121] See CETA, Annex to the Agreement on Cooperation in the Field of Motor Vehicle Regulations, where Canada is encouraged to adopt the World Forum for Harmonization of Vehicle Regulations of the United Nations Economic Commission for Europe.
[122] See CETA, Protocol on the Mutual Recognition of the Compliance and Enforcement Program regarding Good Manufacturing Practices (GMP) for Pharmaceutical Products.

4 Real needs and expectations

The comparison in the previous section proves that there are many areas in which the EU – Mexico Global Agreement can be modernised or updated. And services, in general, must be added to this list of areas, as the 2001 Joint Council Decision on services is nearly empty of effective content. But this possibility must be checked with the real needs and expectations of both Mexico and the EU concerning this modernisation: must this modernisation reach the level of the more recent set of bilateral agreements negotiated by the EU? Or, alternatively, is reaching the level of this new set of agreement sufficient to fill these needs and expectations?

4.1 Existing trade and investment flows between the EU and Mexico

The table below presents the existing trade and investment flows between the EU and Mexico, and makes a tentative projection on future flows based on publicly available documentation.

Trade data for the period 2002-2014 are from Eurostat. Trade data for the period 2015-2017 have been extrapolated using the year-to-year growth rates from OECD data on total volume of imports of Mexico (for exports) and total volume of imports of the median of EU Member States (for imports), assuming a constant weight of bilateral trade flow with respect to total trade used in extrapolation.

Available FDI data exist only for the period to 2012. This is very unfortunate as in 2012, a radical change of pattern occurs and it would be important to confirm whether the change is permanent.

In any case, and simply as an analytical contribution, figures for the period 2013-2014 have been extrapolated using the year-to-year growth rates from OECD data on total FDI outward of the sum of EU Member States (for FDI outward) and total FDI outward of Mexico (for FDI inward), assuming a constant weight of bilateral FDI flows with respect to total FDI used in extrapolation. Figures for FDI during 2015-2017 have been extrapolated using a finite exponential weighted moving average (EWMA) with weights 0.706, 0.212, 0.064, for lags 1, 2, and 3, respectively.

Table 3. Trade and FDI relationships: EU[123] and Mexico

Year	Exports of Goods and Services	Imports of Goods and Services	FDI Outward	FDI Inward
	(Million ECU/EUR)	(Million ECU/EUR)	(Million ECU/EUR)	(Million ECU/EUR)
2002	15,345	6,572	6,608	-217
2003	14,398	6,554	2,000	212
2004	14,729	6,917	10,756	1,205
2005	16,840	9,253	2,601	1,157
2006	19,125	10,566	1,786	304
2007	20,963	12,198	5,771	426
2008	21,978	14,016	6,919	914
2009	15,989	10,156	5,213	2,972

[123] EU definition changes over time: EU-15 until 2000, EU-25 until 2003, EU-27 until 2007, and EU-28 from 2013.

2010	21,344	13,769	7,206	1,935
2011	23,912	17,014	4,735	167
2012	27,971	19,406	222	4,845
2013	27,402	17,515	238 (extrapolation: see text)	2,833 (extrapolation: see text)
2014	28,437	17,973	244 (extrapolation: see text)	1,791 (extrapolation: see text)
2015	29,776	18,865	327 (extrapolation: see text)	2,174 (extrapolation: see text)
2016	31,127	19,616	302 (extrapolation: see text)	2,186 (extrapolation: see text)
2017	32,590	20,614	302 (extrapolation: see text)	2,171 (extrapolation: see text)

Sources: Eurostat, OECD, and own calculations.

The data need no major commentaries: EU imports during the period have increased much more than the exports (imports have nearly tripled while exports have barely doubled), and in 2012, there is a dramatic change in the pattern of FDI, which may have entered into a new regime of much lower flow volumes that is more oriented to the EU from Mexico. These figures tend to strengthen the already mentioned perception of a rising Mexico facing a 'declining' EU.

It is important to highlight that not all trade and investment flows have increased as a result of the EU-Mexico Agreement. Available evaluation and impact studies have found no significant FTA related impact on EU exports to Mexico (mostly because the tariff reductions were spread out over a long transition period).[124] In the EU, the changes in output at sector level have been as small, varying between 0 and 0.2 percent. In Mexico, the output effects have been estimated somewhat more pronounced, especially in two sectors: motor vehicles and electrical machinery.[125] In that light, one may say that the economic results of the agreement, do not completely meet the motivations that were in mind at its negotiation, particularly from the side of the EU, as mentioned in section 2.3.

4.2 Needs and expectations

1. The overall perception of the need for modernisation

The EU and Mexico are considering updating their Global Agreement following the numerous economic and political developments of the last 15 years. This update has been foreshadowed by the EU-Mexico Strategic Partnership (2008) and its associated Joint Executive Plan (2010); however, there have been no concrete legal results beyond dialogue and cooperation activities. A 'Joint Vision Report' was adopted, but its final version has yet to be made public.

[124] Copenhagen Economics (n 2) 5.
[125] ECORYS (n 2) 104.

There is a remarkable concurrence between the EU and Mexico regarding the motivations favouring modernisation of the 1991-2001 set of agreements and decisions that created the legal framework for their trade relations; however, they are more clearly formulated from the Mexican side than from the EU side:

- **Mexico has changed.** In particular, Mexico's changes concern the amount and structure of its international trade. Mexico has seen a strong increase in exports of manufactured products. This has also affected Mexico domestically, as the size and economic weight of its middle-income population has increased and stabilised.
- **The EU has changed.** The EU's changes concern its growth as well as its economic and integration process crises. Furthermore, the EU's revision of its agricultural policy facilitates a process of trade liberalisation that seemed impossible in 2000.[126]
- **The global economy has changed**. The global economy has become much more complex. Global value chains and, consequently, the much greater interdependence of goods and services, create a new panorama for international trade, and affect its legal and institutional frameworks.
- **Geopolitics and geo-economics have changed**. The shifting of economic centres of gravity towards the Pacific puts pressure on the EU to adapt to this new scenario. This shifting enhances the strategic role of Mexico, which is simultaneously Latin American, North American, and a relevant player in the Pacific area.

It is also important to consider two additional factors:

- **The Doha Round**. It is generally acknowledged that the Doha development round has stalled. This is particularly relevant for EU-Mexico relations, as the impending launch of a new WTO round of negotiations during 2000-01 was one of the main reasons (probably, one of the main excuses) for keeping the economic content of these agreements at a low level (and very low in the case of services). Furthermore, the very limited and partial results achieved by the WTO Ministerial Conferences in Bali (2013) and Nairobi (2015), and in particular, the latter concerning the elimination of export subsidies, require a revision of the existing situation.
- **Brazil**. The perception and the likely reality of the serious decline of Brazil's role as the leading Latin American country boosts the importance of Mexico. According to the high-level EU diplomats and officials interviewed for this study, the granting of Strategic Partnership status to Mexico in 2008 was a reaction to the granting of this status to Brazil a year earlier (as a member of the 'BRICS' countries), and essentially arose from the activism of the Mexican Ambassador in Brussels. If one compares the content of the 15-page Commission Communication concerning Brazil with the mere 6-page Communication for Mexico, it is easy to agree with this opinion.[127] At present, the enthusiasm for Brazil is clearly fading, while the sheer economic facts tilt the balance towards Mexico (Mexico having a higher and faster growing GDP per capita in purchasing power parity than Brazil).[128]

[126] Quite a number of other changes have taken place in the EU, particularly in the framework of external relations (from regulatory cooperation in different areas – IPR, SPS, TBTs – to investment). However, neither side perceives them as very relevant for the upcoming negotiations with Mexico, as they do not change the essential content of the offensive/defensive EU matrix of negotiating interests in the same way that the reforms in agricultural policy certainly do.

[127] A short briefing Note in the online Library of the European Parliament gives a useful outline about the Strategic Partnerships and contains links to the most relevant documentation:
http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2012/120354/LDM_BRI(2012)120354_REV1_EN.pdf

[128] According to World Bank statistics (http://data.worldbank.org/indicator/NY.GDP.PCAP.PP.KD), the value in 2014 is 16.284 for Mexico and 15.510 for Brazil. In the period between 2011 and 2015 (with no definitive figures for 2015), it grew to nearly double in Mexico compared to Brazil.

Some of the EU Member State officials interviewed point to another argument not usually stated publicly. In the last fifteen years, Mexico has acquired the status of reliable partner at the international level in two areas:

- **Legal.** The strength of NAFTA[129] has provided Mexico with a sort of prestige as a country that complies with international economic rules, as compared with the lack of prestige attached to MERCOSUR member countries that continually violate their own rules.
- **Political.** In international fora, Mexico does not strive, like Brazil, to become a leading global player beyond its real capabilities, but rather prefers to be a cooperative and loyal partner of other global players, including the EU.

The diplomats and officials interviewed for this study had opposite views on who has taken the initiative for the modernisation. On the Mexican side, it is clear that the EU was the *demandeur*. This is evidenced by a 2013 joint request to Mexican President Enrique Peña Nieto from the Presidents of the EU Council and the European Commission, Herman Van Rompuy and José Manuel Durão Barroso, respectively, which was made in the context of the EU-Latin American and Caribbean (LAC) Summit held in Santiago de Chile. Quite surprisingly, some very well-informed officials in EU Member States had the opposite perception. It is generally accepted that the decision of June 2015 to initiate preparation of the negotiations was taken at the highest level in a restricted meeting of President Peña and Presidents Donald Tusk (EU Council) and Jean-Claude Juncker (European Commission), in which President Juncker played the decisive role.

2. Sectorial economic motivations and the possible new content of the modernised agreements

While there seems to be consensus on the need (or at least the convenience or opportunity) to modernise the present legal and institutional trade framework between the EU and Mexico, there is much less clarity on its specific economic and trade content.

In the European business sector, it is difficult to find a clear and articulate view regarding the content, although there is a certain perception that the present agreement has not worked badly and has not raised further 'problems to be solved'. Most of the arguments about the modernisation of the agreement with Mexico turn around very generic considerations about trade and investment liberalisation, and the convenience of 'ambitious' (or not so ambitious) agreements. Already in 2009, it was reported that while the EU-Mexico arrangements appear to have benefited EU exporters, future negotiations on major issues like agricultural trade or deeper integration seemed unlikely.[130]

A similar reality seems to hold on the Mexican side, where beyond certain niche industries that have positively developed under the preferential EU-Mexico framework,[131] the private sector has been fully absorbed by developments in the Pacific Rim (the PA between Mexico, Chile, Colombia, and Peru, where negotiations on an investment and trade protocol were finalised in February 2014, and the broader Trans-Pacific Partnership (TPP), where negotiations were finalised at the end of 2015).

[129] On 'strength' as one of the four dimensions of regional integration, together with 'effective content', which will be mentioned later, as well as 'external dimension' and 'capacity of adaptation', see Torrent (2002).
[130] Bradly J. Condon (n 3) 94, 96.
[131] Like the aviation or the automotive sector, where low production costs, the proximity to the United States, and a broad network of FTAs have made Mexico an attractive location. See, respectively, ProMéxico, 'National Flight Plan. Mexico's Aerospace Industry Road Map 2014.' (July 2014) <https://www.promexico.gob.mx/documentos/mapas-de-ruta/Roadmap-Aerospace-2014.pdf> accessed 4 February 2016; and PriceWaterhouseCoopers (PwC) Mexico, 'Doing Business in Mexico. Automotive Industry' (September 2014) <https://www.pwc.de/de/internationale-maerkte/assets/doing-business-mexico-automotive.pdf> accessed 4 February 2016.

Therefore, for the time being, the agenda is clearly in the hands of government officials on both sides. Official views can be found in the scoping exercise conducted by the European Commission, which has not been made accessible to the authors, but whose results were already transmitted to the EP.

It should always be recalled that, for trade negotiating purposes, the 'interests in presence' are not the same as 'the economic interests in trade relations'. Most of these interests may already be well served by the existing arrangements and do not require any modification or modernisation. This is particularly relevant in the case of open economies like that of the EU and, to some extent, Mexico. This is relevant to the negotiations because the problems that have to be solved by them are potentially of relatively minor economic importance. This will certainly be the case in the modernisation of the EU-Mexico Global Agreement, beginning with the problem of EU access for the agricultural products excluded in 2000, and continuing with the movement of workers in general (an issue that Mexico will certainly raise, at least as a defensive response to demands by the EU in other trade-related areas judged 'excessive').

Another area for change that will certainly be raised by Mexico is in the current EU rules of origin. Mexico possesses strong arguments in its favour (very often voiced by the EU itself), including the increasing complexity of the global economy through global value chains, and the possible benefits of less restrictive rules of origin for the subsidiaries of European firms established in Mexico. The demand will concern specific lines as well as the issue of accumulation of origin, which in all likelihood will become central to the negotiation.

3. Different perspectives from the EU and Mexico

While agreeing on the objective of broad coverage for the new agreement, the EU and Mexican perspectives diverge radically on the agreement's relationship with existing and future legislation in the areas falling within its scope. For the EU, the 'ambitiousness' of the agreement must not entail any modification of existing legislation besides the needed preferential modification of some import conditions (tariffs and tariff-rate quotas, and maybe some rules of origin), and what has already been agreed in the WTO framework on export subsidies. On the contrary, for Mexico the agreement must be instrumental to its ongoing internal reform in all areas of economic policy, and to modifications in its legislation.

This divergence has two extremely important consequences.

On one side, it is perfectly possible that the EU initiative in launching the negotiation turns to Mexico during the course of the negotiations, with Mexico becoming much more offensive and much less defensive than the EU. Mexico will necessarily raise issues that fit the negotiating framework nicely but which are non-negotiable for the EU, from the regulations in the audio-visual sector or in some areas of telecommunications, to the movement and the legal regime of salaried workers.

On the other side, it concerns the overall architecture of the agreement. Mexico demands a dynamic agreement in whose framework new normative developments are possible and even favoured. For Mexico, 'regulatory convergence' means exactly this: developing in the framework of the agreement new norms with the EU (that could even be used to oppose unwarranted demands from the United States)[132]. It is very doubtful that the EU will accept losing its legislative autonomy (and the European Commission its monopoly of initiative) in that context. Furthermore and as indicated earlier, this is **not** CETA's approach.

[132] Persons interviewed in Mexico emphasize this point and refer to past examples that could be multiplied. One of the examples they mention is the Agreement between the EC and the United Mexican States on cooperation regarding the control of precursors and chemical substances frequently used in the illicit manufacture of narcotic drugs or psychotropic substances (Official Journal of the European Communities L 077, 19/03/1997, p 0024-0030).

4. A new model of agreement?

Section 2 compared the 1997 EU – Mexico Global Agreement with the new set of EU bilateral agreements, in particular CETA. But this comparison must be placed in a wider context. Indeed, as it was just mentioned, the main drivers of the modernisation process, at least presently, are not specific problems or interests, but very broad considerations of geopolitics and geo-economics. This is not surprising. However, if this is the case, it is convenient and even necessary to look at the very broad nature and content of the modernisation process of the present set of agreements and decisions. The following questions should be addressed (and are related to the three scenarios and policy options discussed by the Commission services, which use a very different approach in their impact assessment that accompanies the recommendation for the 'mandate' (see this study's section titled Presentation)):

- **Should this modernisation form the basis for the design of a new type of EU agreement with all third countries** (or at least with strategic third countries)? Or conversely, should it constitute a simple copy and paste of previous EU bilateral agreements (perhaps the more recent agreements)?

  The discussion of this alternative should begin with that of a third option: is a 'new' agreement necessary, or is it sufficient to enact, as in 2000 and 2001, new Decisions of the Joint Council? This possibility should be seriously analysed. If the main objective is the modernisation of the trade pillar of the EU–Mexico Global Agreement, this is undoubtedly the quickest and most effective way to achieve this objective, as it covers nearly all topics in the trade agenda ('all' if the term 'trade' is defined narrowly) and allows for a much speedier decision and implementation than the negotiation of any new agreement.

  If this possibility is discarded, there should be a clear rationale for that action. Those in the EU who are more interested in a deep and broad modernisation would argue that 'much more is needed' and that, legally and politically, it is not 'enough' to rely on Decisions of the Joint Council. However, these are the same persons who argue in favour of a 'new model of agreement' that would, among other effects, allow the combination of all instruments (from research to drug policy) previously agreed with Mexico. It would also be a type of 'open' or 'hub' agreement able to attract other countries in the Pacific Rim, mainly but not necessarily in Latin America, and starting with those in the PA (Colombia, Peru, and Chile, with perhaps Panama and Costa Rica in the future).

  This point would also be shared by Mexico, a country that presently accepts, with no hesitation, the challenge of new and broad agreements, and that would like to enhance its position as an economic leader.

  The alternate option is to **not** follow the easier and faster way (Decisions of the Joint Council) **and not** consider an ambitious new model of agreement, but rather rely on previous precedents. This option seems to lack a rationale other than applying 'templates', which means copying and pasting texts that have been developed for other contexts (historical, geographical, or institutional), a technique that is too often present in international negotiations.

  Furthermore, compared to the United States, the EU has a great disadvantage when following this strategy of 'copying and pasting'. In its bilateral/regional relations, the United States has scarcely modified its own template since its development for NAFTA in 1992-1994, and it has even exported this template to other countries in Latin America for use in their own agreements. However, this is not the case with the EU, which for reasons mentioned in the General Introduction, has often modified its templates for strictly internal reasons related to the distribution of competences between the EC/EU and its Member States (see the next section for a more detailed explanation).

  In contrast, after NAFTA was created, Mexico has more or less closely followed the NAFTA template in FTAs with third countries, notably in the recently agreed TPP and in the PA. One might ask why Mexico

would be ready to accept an ever-changing EU model agreement when it already concluded deeper and more comprehensive agreements with other developed and developing partners.

- **The 'mixed' character of the agreement**. In this perspective, a highly important issue should be addressed squarely: that of the 'mixity'[133] of the new agreement. In the economic area:
    - Will the new agreement cover only the areas falling under EU exclusive competence?
    - Will the areas falling under Member State competence be considered 'residual' and be kept as limited as possible?
    - Will it ambitiously and offensively bring together the EU and its Member States to deal with all relevant issues (relevant for EU and Mexican citizens, business, civil society, and governments) without considering whether they fall under EU or Member State competence?

  This 'mixity' issue can be all-important in the framework of the future negotiations for two main reasons:
    - As attested in the interviews conducted, Mexico feels that it has better relations with EU Member States than with EU institutions, which it finds '*ensimismadas*' (the very beautiful Spanish term used by interviewed persons that is difficult to translate properly as it more or less has the double meaning of 'not attentive because it is closed in on itself and inwardly looking').
    - As already mentioned, in the negotiating context it is very likely that the EU, which seems to have taken the initiative to launch the negotiations, will fall rapidly into a defensive position as Mexico pushes for a very far-reaching agreement without caring who is competent for the areas it covers, either the EU or its Member States.
- **Investment promotion and protection**. The issue of the new 'model' of agreement is also extremely relevant in an area that will certainly be one of the more difficult to negotiate: investment and investment promotion and protection. It seems that the European Commission is proposing a 'new model' for the chapter on investment, but that will be introduced in an 'old model' of agreement. It could be argued that this would be more promising: to create a 'new model' of agreement in which a 'new model' of investment chapter could also be conceived. For example, leaving aside the issue of investor-to-state dispute settlement (whether in favour or against this issue) where it belongs (bilateral investment treaties), the real advantages ('pluses') that a new model of investment treaty may bring are substantial. They include true measures of investment promotion, procedures to apply in cases of expropriation with adequate compensation, and an enhanced as well as more effective and balanced mechanism of state-to-state dispute settlement concerning investments, which includes investor consultation to their home governments (or to the European Commission in the case of the EU) before

[133] 'Mixity' is the term, in the jargon of EU foreign relations experts, which refers to whether an 'EU agreement' with a third country is to be signed and concluded by the EU alone, or by the EU and all its Member States. As the alternative must be discussed on the basis of the distribution of competences established by the Treaties between the EU and its Member States, the discussion becomes legal while it is also, even primarily, political. The following question demonstrates this: If the EU plus its Member States must collectively become a 'global actor' similar to the United States, China, India, or Russia, can the EU alone (with its very limited 'competences by attribution'), or the Member States alone (without the competences conferred to the Union), be able to face those other global actors? The answer seems clearly negative. Only the 'compound' actor, EU-plus-Member-States, has the competences comparable to those of the US, China, India, or Russia. 'Mixity' may be a problem in its management, but it is the only realistic approach if the EU-plus-its-Member-States wish to be a global actor in deeds, and not just in words.

triggering conflict with a third country. These issues are of utmost importance but are absent from Member States' BITs.

5. The new agreement, the pillar structure, and the mechanisms of decision-taking

There seems to be much better 'historical memory and comprehension' on the Mexican side than on the European side concerning the genesis and evolution of the 1997 Global Agreement. This is why a problem and a request have appeared in the interviews conducted with Mexican experts in diplomatic and governmental circles (as mentioned, the need for and the process of updating the EU-Mexico arrangements are largely unknown to the Mexican business community, academia, and civil society).

The problem concerns the 'three pillars' structure of the agreement and how it affects the real development of EU-Mexico relations.[134]

- For the EU, the differentiated structure of the 'three pillars' (in particular, the separation of the 'Political Dialogue' and 'Trade' pillars) appeared as a consequence of the need to accommodate in the agreement a) the EC with its uncontested exclusive competence in Commercial Policy (and its contested competence in other economic areas), and b) Member States (with their uncontested competence in most of the areas covered by the Political Dialogue). Even after the merger of the EC and the EU in the Lisbon Treaty, the distinction (in law and practice) between the two pillars remains, and parallels the distinction between the European Commission and the European External Action Service.
- For Mexico, this distinction/separation is non-existent because, at any rate, it is a distinction between different ministries within the same government. Interviewed persons in Mexico with a very good knowledge of the last two decades of EU-Mexico relations would favour a much greater integration of the Political Dialogue and Trade Pillars in order to allow the second to receive an impulse from the first (a very legitimate and well-founded aspiration, but which will be perceived in the EU framework as a loss of the European Commission's monopoly of initiative).

The request also concerns the institutional arrangements. The same sources, well aware of the enormous potential of the establishment of a Joint Council with the capacity to take binding decisions, would favour a better definition of the mechanisms of decision-making and decision-taking leading to the final Joint Council decision. If accepted, this could also become one very useful way to modernise the existing agreement.

[134] We refer to the 'three pillars' of the agreement (Political Dialogue, Trade and Trade-related matters, and Cooperation), which have nothing to do with the so-called 'three pillars' structure of the European Union after the Maastricht Treaty, and the entry into force of the Treaty on the European Union. Both Trade and Cooperation (two of the three pillars of the agreement with Mexico) belong to the 'Community pillar' of the EU.

5 Relation to other relevant trade agreements or ongoing negotiations

The reasoning in the last sub-sections leads necessarily to a discussion concerning the relationship of the modernisation of the EU – Mexico Global Agreement with other relevant trade agreements or ongoing negotiations that the EU is party to. This section examines the new reality of trade agreements and is divided into two parts. The first is written from the EU perspective. It analyses the evolution of the EU's bilateral trade agreements with the objective of offering an overall background for the policy discussion on what could (or should) be the reference or model for the modernisation of the Trade Pillar of the EU–Mexico set of agreements and decisions. The second is written from the Mexican perspective and provides a comparative examination of the agreements and negotiations that could be considered more relevant by Mexico.

However, both parts should be read under the 'long shadow' of the current Transatlantic Trade and Investment Partnership (TTIP) negotiations between the EU and the United States. If they succeed, as many people interviewed seem to think, and reach a deep agreement, there is unanimity in the belief that any new EU–Mexico agreement will essentially replicate TTIP's content. Similarly, those more optimistic about the outcome of current TTIP negotiations consider that any significant EU move towards Mexico is very unlikely until the negotiations reach their final stage. However, if TTIP negotiations continue dragging on or become an arrangement with no real depth, even if heralded as a great 'step forward', then the negotiations with Mexico gain enormously in autonomy (not only by reference to the United States, but also by reference to Canada).

5.1 The view from the EU: are there 'models' to be followed in modernisation?

As mentioned, the United States has a well-defined 'model' or template for its bilateral and regional agreements: that of NAFTA. This is not the case for the EU (nor for the EC previously).

The absence of an 'EU model' certainly creates confusion not only at the international level, but more importantly at the internal level because economic operators and civil society at large (and even policy-makers) do not understand the different natures, characteristics, and policy objectives of the international economic agreements concluded by the EU with different partners.

This diversity could have a very positive aspect if it responded to the different historical, economic, political, and geographic contexts in which the agreements are negotiated and signed. It would constitute a very healthy reaction to the approach that unfortunately prevails in international economic relations, according to which 'templates' acquire a life of their own and are applied to circumstances completely different from those for which these templates were first designed.

However, this is not the case for the EU. The evolution of its international bilateral and regional agreements responds largely to a strictly internal, legal and institutional, reason: the evolution in the distribution of competences between the EC / EU and its Member States:

- In the first period, when it was only the EC that promoted bilateral trade relations and all the other main global players in the capitalist world relied on GATT as the only international trade agreement, the main reference for the EC's bilateral international agreements was the EC Treaty itself, whose structure they somehow mirrored. Of course, the best example of this approach is the agreement establishing the EEA Agreement, negotiated in 1989-1991, signed in 1992 and entered into force in 1994. However, this approach still inspired later agreements, notably the European Agreements signed with countries in Central and Eastern Europe in the 1990s, and the Euro-Mediterranean agreements signed in the second

half of the 1990s and the 2000s (even if the GATS 'pollution' (see the next two points) was already felt in the latter).

- NAFTA's signature in 1992 had no effect at the time on the EC's bilateral agreements. The main change came as a result of the inclusion of GATS within the package of WTO agreements issued from the Uruguay Round (entry into force in 1995). GATS created a completely new notion, 'Trade in Services', defined in a way that includes not only international exchanges of services but also FDI in the services sectors, nicknamed 'Commercial Presence' or 'Mode 3 of supply of services'. The European Commission used this invention to justify an extension of the EC's exclusive competence in Commercial Policy to 'Trade in Services' (in the GATS sense: i.e., including FDI in the services sectors). It succeeded in the Treaty of Nice (2001), which brought about this extension.

- As a result of this internal legal-institutional development and at the initiative of the European Commission, accepted by the Council and by Member States, from 2001 onwards the EC's bilateral agreements turned GATS-like in order to fully exercise this new competence. The best example, which is very relevant for the two studies commissioned by the Parliament, is the agreement with Chile signed in November 2002, whose chapter on Services is essentially taken verbatim from GATS (including the recourse to a 'positive list' of specific commitments).

- The negotiations of the 'Constitutional' Treaty opened a new period that was finalised when its economic provisions entered into force as part of the Lisbon Treaty in 2009.[135] As they redefined the scope of the EU's Commercial Policy and extended it explicitly to FDI, there is no longer the need for FDI to enter EC agreements through the back door as 'Trade in Services'; it can now enter as such through the main door. Therefore, the Chilean/GATS-like model is abandoned. The best examples of this approach are the agreements with Korea, Central America (CA), and Singapore.

- However, this leaves the discussion open on an extremely important and barely addressed question: how to deal with investment '*tout court*', covering all forms of investment. On this, an evolution is clearly perceptible from the agreements with Korea, CA, and Singapore, to the agreement with Canada, already analysed in sub-section 3.2.

  In order to understand this evolution, it is essential to emphasise an important fact insufficiently reflected upon. In the EC Treaty (and now in the TFEU), as opposed to NAFTA, there is not a unified chapter dealing with 'investment' (in fact, this is a notion alien to EU law, so surprising as this legal fact may seem to many). Instead, there are two completely different chapters, one dealing with establishment (which would be the EU law equivalent to FDI) and the other with movement of capital. As Annex I to this section explains in greater detail, this is extremely sound because the economic, legal, and political problems brought by the establishment of foreign firms and by the movement of capital are radically different.[136]

  A trace of this distinction can still be found in the agreements with Korea, CA, and Singapore, as they discuss establishment in one chapter (together with services) and include a separate chapter discussing

[135] Indeed, the Lisbon Treaty was drafted by the Jurisconsult of the EU Council by separating the provisions of the 'Constitutional' Treaty in two categories: 'constitutional' ones to be left aside and 'non-constitutional' ones, particularly including the economic provisions, **to be incorporated without the slightest modification** into the Lisbon Treaty.

[136] This question, although extremely relevant, is rarely discussed by academic literature (see Xavier Fernandez-Pons and Ramon Torrent, 'The (Unnoticed?) Contradictory Overlapping of International and Domestic Rules on FDI: Getting the Legal Facts Right. Society of International Economic Law (SIEL), 3rd Biennial Global Conference, Singapore July 2012' (Social Science Research Network 2012) SSRN Scholarly Paper ID 2091211 <http://papers.ssrn.com/abstract=2091211> accessed 3 February 2016.), but it has been present in EU institutions since at least 1996 when it was passionately discussed by the Council and the Commission's Legal Services.

either movement of capital (Korea and CA) or investment protection (Singapore). This is also the case with the Association Agreement with Ukraine (signed in June 2004), which is similar in this regard to the agreements with Korea and CA, and extremely comprehensive. This agreement should also be examined carefully as a precedent for the new agreement with Mexico.

This distinction nearly disappears in the agreement with Canada (CETA), which instead conforms to the NAFTA model of a single chapter on investments, following the standard NAFTA content. A tribute to the former 'love' for GATS is evidenced by effectively incorporating Article XVI GATS in Article X.4 CETA.

Therefore, the 'NAFTA-isation' of EU international agreements has replaced a previous 'WTO/GATS-isation'[137] and has completely buried the initial approach of trying to mirror the approach of the EC Treaty in these international agreements. This consideration is extremely relevant for the discussion about which should be the reference for the modernisation of the Global Agreement with Mexico. Furthermore, it is evident that, if the political goal is to ambitiously deepen and broaden the Trade Pillar of this Global Agreement without simply more or less copying NAFTA or NAFTA-like agreements (including the TPP Agreement or CETA), the precedent of the old Association Agreements must be introduced into the discussion. This undoubtedly seems the best approach to tackle, from a specifically European perspective, the broadening of relations with Mexico to new areas that are now covered by recent agreements concluded by Mexico, in particular the TPP (see point 5 of the following sub-section 3B).

The old 'Association Agreements' concluded by the EC and its Member States (the EEA as well as the Europe agreements; previously, the Agreement with Turkey; and to a much lesser degree, the Euro-Mediterranean agreements) have two great advantages that can be maintained even if their scope and coverage were reduced in the case of a new agreement with Mexico:

- The first is that, in structure and thematic coverage, the old 'Association Agreements' mirror the EC Treaty (this is very different from NAFTA and its likes and from the WTO agreements). Therefore, they follow a specific 'EC/EU approach' to international economic relations (IER) and regional integration (RI).
- The second is that they approach IER and RI as dynamic processes that, while having strong foundations in their primary law, require continuous law-creation and law-adaptation[138]. This is done through the creation of an effective mechanism of law-creation. In the EEA case, this mechanism is able to comprehensively re-create, as new EEA secondary law, the new secondary EU internal law. In the other cases, it has led to extremely interesting developments in areas of utmost importance for 'regulatory convergence': the Joint Council decision on the regulation of competition, for example, in the framework of the Europe Agreements. Therefore, the old Association Agreements approach builds on what must undoubtedly be considered the greatest and best contribution of European integration to the architecture of international economic integration, which is its wise and well-balanced articulation of primary and secondary law.[139]

These two great advantages are interlinked, as experience proves that the only way of really tackling the issue of 'regulatory convergence', one of the main alleged objectives of the modernisation of the EU–

[137] We introduce these two barbarisms for the sake of simplicity, and in order to highlight the extremely important point that the replacement of the EU approach to investment (which already was at the core of the EEC treaty of Rome) was by approaches designed in contexts outside of European integration.

[138] See also concerning 'Dynamism and capacity of adaptation' as one of the four dimensions of regional integration, Ramon Torrent (n 12).

[139] The articulation and good balance that were broken by the Maastricht Treaty in the new provisions introduced in the EC Treaty. See Ramón Torrent Macau, '¿Cómo Gobernar Aquello Que Se Desconoce?: El Caso de La Comunidad Europea En Tanto Que Unión Económica Y Monetaria' (2005) 9 Revista de Derecho Comunitario Europeo 47; and Ramón Torrent, '¿Cómo Se Engendró En Los Años 1980 La Crisis Del Proceso de Integración Europea Que Ha Estallado En Los Años 2000?' (2007) 37 Cuadernos europeos de Deusto 145.

Mexico trade legal framework (and certainly the one in which the EU is the absolute world leader), is by the enactment of secondary law. The other options are: a) promoting voluntary standards accepted by private firms, which has limited usefulness and is only practicable in some sectors; b) creating committees and subcommittees that discuss and study without much practical effect; or c) by adopting an approach in which regulation is viewed as simply creating indirect barriers to trade and, consequently, something to be progressively abolished.

This is also why it was so important in Section 1 to carefully describe the institutional setting of the Global Agreement, as it already provides for the main element required to put this approach into practice: a Joint Council able to take decisions in order to progressively create secondary law, and which has already used this competence to the fullest and at the full satisfaction of all Parties.[140]

5.2 The view from Mexico: comparative examination of other relevant agreements and negotiations

1. Government procurement

Without considering Partial Scope Agreements concluded by Mexico under the Latin American Integration Association (ALADI), all Mexican FTAs have provisions regulating public procurement, with the exception of the Mexico-Peru FTA. However, the Additional Protocol signed in 2014 between Mexico and Peru, together with Chile and Colombia in the framework of the Pacific Alliance, includes a detailed chapter on public procurement (Chapter 8), which more closely resembles the language in CETA.

Further, all public procurement provisions in Mexican FTAs follow a similar structure. They include the principles of national treatment and non-discrimination, rules of origin, denial of benefits, tendering procedures, special provisions for government procurement for small businesses, and lists of entities (federal, state and provincial, and government enterprises) covered by the agreement. Only the Mexico-Chile FTA includes a provision allowing the Parties to have recourse to the dispute settlement mechanism of the agreement in alleged cases of nullification or impairment related to government procurement regulated in this chapter (Article 15bis27).

Both the TPP and the Pacific Alliance treaties include provisions on government procurement. TPP Chapter 8 aims to coexist with existing international agreements on public procurement, including WTO and NAFTA, with a reduction in the applicable procurement thresholds.[141] The Additional Protocol of the Pacific Alliance deepens the level of commitments at a sub-federal level as compared to existing FTAs with other member countries (except with Peru, with which it becomes a new chapter).[142] Overall, these agreements do not significantly depart from what has been agreed in CETA regarding public procurement.

2. Investment

In general, when investment chapters are included in Mexican FTAs, they are usually found next to the chapter on cross-border trade in services, and include disciplines on sector liberalisation (through negative lists), NT, MFN treatment, minimum standards of treatment, performance requirements, free

[140] CETA also creates a Joint Committee that has the power to make binding decisions. However, in practice, once the agreement is entered into force, it doesn't seem that this Joint Committee will be able to compare with the mechanisms created by the Association Agreements (including that with Ukraine), or by the Global Agreement with Mexico.
[141] Paul Lalonde and others, 'Trans-Pacific Partnership: Landmark New Commitments on Government Procurement' (*Dentons*, 7 January 2016) <http://governmentcontracts.dentons.com/en/insights/alerts/2016/january/7/transpacific-partnership-landmark-new-commitments-on-government-procurement> accessed 29 February 2016.
[142] 'SICE: Countries: Mexico : Trade Policy Documents' (*SICE - Foreign Trade Information System*, February 2016) <http://www.sice.oas.org/ctyindex/MEX/MEXagreements_e.asp> accessed 29 February 2016.

transfers of capital, expropriation and compensation, and dispute settlement (including investor-state arbitration).

In February 2014, Mexico, together with the other three countries that formed the Pacific Alliance in 2011 (Colombia, Chile, and Peru), signed a protocol that includes a chapter on investment with substantive and procedural investment protection standards that are similar to the ones included in previous Mexican PTAs' investment chapters.[143] This protocol has yet to be ratified. The recently negotiated TPP includes a detailed investment chapter that aims to consolidate the level of liberalisation to foreign investment already existing in Mexican laws and treaties, and to improve the current standards of protection for foreign investors, striking an appropriate balance between protection of foreign investments and the sovereign right of states to regulate their interests in pursuit of legitimate public policy objectives. Overall, the TPP investment chapter is very similar to what Mexico has concluded in other FTAs after NAFTA.

Regarding investment, Mexico will follow very closely the recently concluded EU-Vietnam FTA,[144] the 'scrubbed' CETA investment chapter – virtually a renegotiation of the text – as well as developments in the TTIP framework, particularly the European Commission proposal of a standing investment court for investor-state disputes.[145] In both the EU-Vietnam FTA and the revised CETA text there is a broad consideration of the 'right to regulate', which includes even deleting 'necessary' from the phrase 'necessary to achieve legitimate policy objectives'. Most importantly, both treaties are the first concrete case of inclusion of the abovementioned EU proposal for a standing court system to settle investor-state disputes. However, certain minor differences can be detected across the different treaties, as the Court in the EU-Vietnam FTA comprises nine members (instead of 15 in CETA and in the TTIP proposal). Working procedures are a bit more detailed in the EU-Vietnam FTA, stipulating that where consensus cannot be reached in Vietnam, majority is sufficient.[146] Other important difference include a strict rule stating that arbitral tribunals shall be bound by the interpretations of domestic law given by competent courts and authorities (rather than the 'Tribunal shall follow the prevailing interpretation' in CETA and in the TTIP proposal).

3. Regulatory convergence

a) Regulatory improvement in the Pacific Alliance

Mexico and the other countries of the Pacific Alliance (PA) have understood that most trade barriers in the world today are not tariffs, but regulatory restrictions. That is why the PA has been working on improving regulatory processes focused on transparency and increasing trade facilitation.[147]

On July 3, 2015, the member countries of the PA signed a Protocol Amending the First Additional Protocol to the Framework Agreement of the PA, which includes in its Annex 4 contains a new Chapter 15 on regulatory improvement. In this chapter, it is envisaged that regulatory improvement is achieved for the members of the PA through the establishment and systematic implementation of tools such as

[143] United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2014. Investing in SDGs: An Action Plan* (United Nations 2014) 115 <http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf> accessed 26 June 2014.
[144] European Commission - Directorate General for Trade, 'EU-Vietnam Free Trade Agreement: Agreed Text as of January 2016' <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> accessed 5 February 2016.
[145] European Commission, 'Transatlantic Trade and Investment Partnership. Trade in Services, Investment and E-Commerce. Chapter II - Investment' (12 November 2015) <http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf> accessed 5 February 2016.
[146] EU-Vietnam FTA, Article 12(10).
[147] Ministerio de Comercio, Industria y Turismo de Colombia, '100 Preguntas de La Alianza Del Pacífico' (5 February 2016) <http://www.mincit.gov.co/tlc/publicaciones.php?id=7180> accessed 8 February 2016.

transparency and public consultation, review and *ex ante* and *ex post* measurement of the impact of regulations, and the simplification of procedures and services. [148]

The origin of this chapter is rooted in the Fifteenth Meeting of the High Level Group (HLG) of the PA, held in May 2013 in Santiago de Chile, where the HLG instructed the formation of a technical group with the mandate to negotiate a chapter on regulatory improvement from June 2013. As an initial goal, it was established that this chapter would reflect similar commitments agreed at that time by the members of the PA in other processes of trade integration of which they are part. Although the original idea was that this negotiating chapter would be finished in 2014[149] and that it would not be part of the Additional Protocol to the PA, the negotiations were extended to mid-2015 and the chapter ultimately became a modification of the First Additional Protocol. According to reports from the PA, the text is based on the Recommendations of Good Regulatory Practices (OECD, 2012) and the Asia-Pacific Economic Cooperation (APEC)-OECD checklist on regulatory reform. [150]

This new PA chapter considers internal and external mechanisms in order to improve regulation, economic competition, and the business environment. Regulatory improvement is then defined as 'the use of international best regulatory practices in the planning, preparation, adoption, implementation and review of regulatory measures to facilitate the achievement of objectives of national public policy, and the efforts of governments to improve regulatory cooperation in order to achieve these objectives and to promote international trade, investment, economic growth and employment'.[151]

However, not every governmental measure is considered a regulation. Regulatory measures are understood as those of general application regarding any matter covered by the Additional Protocol adopted by regulatory authorities and for which compliance is mandatory. In addition, they must be a 'covered' regulatory measure, which means that each Party shall, no later than three years after the entry into force of the amendment to the PA First Protocol, identify and make available to the public the 'covered' regulatory measures to which the provisions of the new chapter would apply, in accordance with its laws. In that determination, each Party shall consider achieving significant coverage.[152] Another important restriction is that the chapter on regulatory improvement is not subject to the dispute settlement provisions of the Additional Protocol, so its non-compliance is not directly enforceable by Member States. Similarly, it also stipulated that in the event of any inconsistency between the regulatory improvement chapter and other chapters of the PA Additional Protocol, the latter should prevail. [153]

However, although a level of convergence between PA members is desired, the same chapter on regulatory improvement affirms the importance of the sovereign right of each Party to establish regulations as it deems appropriate, and to identify its regulatory priorities while establishing and implementing regulatory reform measures that take into account these priorities in the fields and levels of government that the Party deems appropriate.[154]

According to this new legal framework, the PA has envisaged both internal and external mechanisms of regulatory convergence. Internal mechanisms include commitments on good regulatory practices, and a process of coordination and review. External mechanisms include –like in CETA– the creation of a

[148] Alianza del Pacífico, 'Temas de Trabajo' (*Alianza del Pacífico*, 8 February 2016) <https://alianzapacifico.net/temas-de-trabajo/> accessed 8 February 2016.
[149] The Declaration of Presidents of Cartagena de Indias, February 10, 2014, mandated the conclusion of a chapter on regulatory reform within the Alliance for the second half of 2014.
[150] First Amending Protocol to the Additional Protocol to the Framework Agreement of the Pacific Alliance https://alianzapacifico.net/?wpdmdl=4580> accessed 8 February 2016.
[151] First Amending Protocol to the Framework Agreement of the Pacific Alliance, Article 15bis2.1.
[152] First Amending Protocol to the Framework Agreement of the Pacific Alliance Article 15bis3.
[153] First Amending Protocol to the Framework Agreement of the Pacific Alliance Article 15bis10.
[154] ibid.

Regulatory Improvement Committee,[155] regulatory cooperation activities, and implementation mechanisms, mainly through reporting and the review of the implementation reports.[156]

b) Regulatory improvement in the TPP[157]

On October 5, 2015 and after more than five years of negotiations, the 12 negotiating countries of the TPP Agreement announced an agreement. While the Citizens Trade Campaign had previously leaked various sections of the agreement on the Internet,[158] the official text was made available after its signing in New Zealand on 4 February 2016.[159]

The stated regulatory convergence goals of the TPP negotiations differ from what can be found in previous PTAs, taking a bolder step to eliminate unnecessary regulatory barriers and making the regulatory systems of member countries more compatible and transparent.[160] The regulatory coherence chapter in the TPP purportedly includes mechanisms to achieve greater domestic coordination of regulations, increase transparency and stakeholder engagement, and improve competitiveness and the ability of small and medium businesses to engage in international trade.[161]

In September 2012, the United States Congressional Research Service reported that regulatory coherence 'represents one of the new cross-cutting trade issues added to the TPP negotiations. The goal of regulatory coherence is to ease the conditions and costs of trade between TPP countries while affirming their right to regulate in pursuit of legitimate policy objectives'.[162]

The United States Trade Representative (USTR) has noted that negotiations towards a TPP stem from the proliferation of regulatory and non-tariff barriers (NTBs), which have become a major hurdle for businesses seeking enlarged access to partner country markets. Efforts under the TPP focus on 'improving regulatory practices, eliminating unnecessary barriers, reducing regional divergences in standards, promoting transparency, conducting regulatory processes in a more trade-facilitative manner, eliminating redundancies in testing and certification, and promoting cooperation on specific regulatory issues.'[163]

In this context, the main declared objective of regulatory coherence is the harmonisation or, alternatively, the mutual recognition of regulatory measures that exert a major influence on international trade.[164] However, the TPP has a broader scope and includes procedural rules on transparency (public notice and prior consultation for new regulations); elimination of duplicative and overlapping regulations; rules against anticompetitive practices, particularly for government monopolies and state-owned enterprises;

[155] First Amending Protocol to the Framework Agreement of the Pacific Alliance Article 15bis6.
[156] First Amending Protocol to the Framework Agreement of the Pacific Alliance Article 15bis9.
[157] This section draws on Rodrigo Polanco Lazo, 'The Trans-Pacific Partnership Agreement and Regulatory Coherence' in Tania Voon (ed), *Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership Agreement* (Edward Elgar Publishing 2013).
[158] Citizens Trade Campaign, 'Trans-Pacific Partnership (TPP). Regulatory Coherence' (4 March 2010) <http://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacificRegulatoryCoherence.pdf> accessed 24 June 2015.
[159] United States Trade Representative, 'TPP Full Text' (December 2015) <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> accessed 23 December 2015.
[160] Ian F. Fergusson and Bruce Vaughn, 'The Trans-Pacific Partnership Agreement' (2011) Congressional Research Service 8 <https://www.fas.org/sgp/crs/row/R40502.pdf> accessed 24 June 2015.
[161] Thomas Bollyky, 'Regulatory Coherence in the TPP Talks' in C. L. Lim, Deborah Kay Elms and Patrick Low (eds.), *The Trans-Pacific Partnership: A Quest for a Twenty-first Century Trade Agreement* (Cambridge University Press 2012) 171.
[162] Ian F. Fergusson, Mark A. McMinimy and Brock R. Williams, 'The Trans-Pacific Partnership (TPP) Negotiations and Issues for Congress' (2015) 41 <https://www.fas.org/sgp/crs/row/R42694.pdf> accessed 24 June 2015.
[163] United States Trade Representative, 'Trans-Pacific Partnership (TPP) Trade Ministers' Report to Leaders' (12 November 2011) <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2011/november/trans-pacific-partnership-tpp-trade-ministers%E2%80%99-re> accessed 24 June 2015.
[164] Claude Barfield, 'The TPP: A Model for 21st Century Trade Agreements?' (*East Asia Forum*, 25 July 2011) <http://www.eastasiaforum.org/2011/07/25/the-tpp-a-model-for-21st-century-trade-agreements/> accessed 24 June 2015.

greater use of mutual-recognition agreements for services and health and safety regulation; and clear lines of administrative and judicial appeal.[165] In fact, in the TPP chapter on regulatory coherence, there appears to be a predominant emphasis on convergence in procedural requirements rather than convergence on the substantive content of regulations.

The United States government has made clear its interest in regulatory coherence. Executive Order (EO) No. 12866 (Regulatory Planning and Review), issued on 30 September 1993 by President Bill Clinton, already featured all of the elements of regulatory coherence discussed above, although it never mentioned the concept itself. According to the OECD, one of the many stated objectives of EO 12866 was to make the regulatory process more accessible and open to the public.[166] In May 2012, President Barack Obama issued an executive order entitled Promoting International Regulatory Cooperation. The order established the creation of an interagency working group, led by the White House Office of Information and Regulatory Affairs, to promote international cooperation in order to reduce unnecessary regulatory differences across borders.[167]

The TPP chapter on regulatory coherence starts with a general provisions section that includes several statements regarding the importance of regulation and regulatory processes. Significantly, the chapter appears alert to the looming difficulty of agreeing on the general scope of regulatory coherence. Nevertheless, Articles 25.1 and 25.3 of the chapter confirm that the obligation of regulatory coherence is limited to certain regulatory measures (covered regulatory measures) as defined by each country. Each Party shall promptly, and no later than one year after the date of entry into force of the TPP, determine and make publicly available the scope of its covered regulatory measures. In determining the scope of covered regulatory measures, each Party should aim to achieve significant coverage

The OECD and APEC did not consider it necessary to specify limits on the measures covered, which is consistent with the voluntary nature of their regulatory proposals. Under the regulatory coherence chapter of the TPP, a Party could choose to exclude certain rules from the coordination mechanism, in recognition of the fact that such a mechanism forms an integral part of a set of treaty obligations rather than a non-binding set of policy recommendations. For some, the TPP approach significantly transforms the voluntary character of the existing OECD/APEC 'best practices' documents to an apparently enforceable obligation to establish regulatory processes and mechanisms. This change is not readily obvious, as the text uses hortatory language.[168]

Nonetheless, as in the APEC–OECD Checklist, this chapter of the TPP allows countries to choose between establishing mechanisms, processes, or a central body for coordination.

As previously agreed in the PA, the TPP envisages both internal and external mechanisms of regulatory convergence. Internal mechanisms include the encouragement of regulatory impact assessments (RIAs)[169] and provisions on the transparency and participation of stakeholders.[170] External mechanisms include (as in CETA and the PA) a Committee on Regulatory Coherence consisting of representatives of

[165] ibid.
[166] Organisation for Economic Co-operation and Development (OECD), 'Regulatory Reform in the United States. Enhancing Market Openness through Regulatory Reform' (1999) 11 <http://www.oecd.org/trade/2756360.pdf> accessed 24 June 2015.
[167] Cass Sunstein, 'Reducing Red Tape: Regulatory Reform Goes International | The White House' (*White House Office of Management and Budget*, 1 May 2012) <https://www.whitehouse.gov/blog/2012/05/01/reducing-red-tape-regulatory-reform-goes-international> accessed 24 June 2015.
[168] Jane Kelsey, *Preliminary Analysis of the Draft TPP Chapter on Domestic Coherence* (23 October 2011) Citizens Trade Campaign <http://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacific_RegCoherenceMemo.pdf> 5.
[169] TPP, Article 25.1.
[170] TPP, Article 25.5.5.

the governments of the Parties. In addition, each Party shall designate and notify a point of contact to provide information at the request of another Party.[171]

4. Sustainable development and other related issues

Provisions with sustainable development policy objectives are increasingly considered in FTAs and IIAs, particularly with respect to environmental and labour issues. Some studies have highlighted a trend among South-South FTAs to gradually include labour provisions.[172] In the same line, other studies have reported[173] that language referring to environmental issues is rare in BITs, but is becoming increasingly common in other IIAs, both in North-South and South-South agreements.

However, almost none of the Mexican BITs has explicit labour or environmental provisions, and only some of the investment chapters in Mexican PTAs tackle these issues, including provisions on labour and environment.

NAFTA was the very first Mexican FTA, signed with the United States and Canada in 1992, that included provisions for sustainable development and environmental protection; however, these were included in side agreements. The side agreement on environment, called the North American Agreement on Environmental Cooperation (NAAEC) committed all NAFTA members to study environmental problems, develop scientific research and technology to improve environmental protection, and educate their publics about the environment. The three governments also pledged to strictly enforce **their own** environmental laws and to ensure that private citizens had access to their national court systems to promote environmental protection. It also said that the governments should 'consider' implementing environmental protection measures suggested by a new trilateral group: the Commission for Environmental Cooperation (CEC). The CEC also has the task to rule on disputes if one country believes that another is not enforcing its environmental laws effectively. Thus far, all disputes brought to the attention of the CEC have been submitted through citizen submissions on enforcement matters, exposing dangerous environmental practices in all three member countries. However, the procedures are deemed complex, and the consequences of a negative decision by an arbitral panel are minimal, including development of an 'action plan' to resolve the non-enforcement and only symbolically significant fines against the offending government.[174]

NAFTA partners also signed a parallel North American Agreement on Labour Cooperation (NAALC) to promote the effective enforcement of **each country's** labour laws and regulations, and to facilitate further cooperation between NAFTA members on these matters. The NAALC established the Commission for Labour Cooperation (CLC), consisting of a Ministerial Council and a Secretariat. In the implementation of the NAALC, the CLC is assisted by National Administrative Officers (NAOs) in each of the three countries. Although in the NAALC there is no explicit reference to ILO instruments, the agreement strives for a high level of national labour laws in the area of Core Labour Standards (CLS), as well as minimum working conditions and migrant rights. The NAALC also provides for a follow-up mechanism, which may ultimately lead to fines for the Party in breach of certain labour provisions.[175]

[171] TPP, Article 25.6

[172] Franz Christian Ebert and Anne Posthuma, 'Labour Provisions in Trade Arrangements: Current Trends and Perspectives' 19–20 <http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_192807.pdf> accessed 8 July 2014.

[173] For an overview of environmental provisions in investment agreements, see: Kathryn Gordon and Joachim Pohl, 'Environmental Concerns in International Investment Agreements: A Survey' (2011) <https://www1.oecd.org/daf/internationalinvestment/investmentpolicy/48083618.pdf> accessed 21 January 2014.

[174] SUNY Levin Institute, 'The Environment and NAFTA' (2015) <http://www.globalization101.org/the-environment-and-nafta/> accessed 5 February 2016.

[175] Franz Christian Ebert and Anne Posthuma (n 175) 8–9.

The Mexican FTA with Chile (1998) does not include a supplementary agreement or a chapter on environment or labour. However, in the preamble of this treaty, sustainable development and environmental protection are considered as general objectives, and both treaties include a provision[176] establishing that nothing in the investment chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure that it considers appropriate to ensure that an investment activity in its territory is undertaken in a manner sensitive to environmental concerns. In addition, it is recognised to be inappropriate to encourage investment by relaxing domestic health, safety, or environmental measures. Consequently, a Party should not waive or derogate from such measures as an encouragement for the establishment, acquisition, expansion, or retention in its territory of an investment of an investor. If a Party considers that the other has offered such an encouragement, it may request state-to-state consultations with a view to avoiding any such encouragement.

The Mexico-Peru FTA (2011) has a lower environmental threshold, only establishing that nothing in the investment chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure that it considers appropriate to ensure that an investment activity in its territory is undertaken in a manner sensitive to environmental concerns.[177] There are no obligations not to lower environmental standards and there are no state-to-state consultations in environmental matters. The Pacific Alliance Protocol (2014) only includes sustainable development in the preamble, and a provision not to lower environmental standards in the investment chapter.[178]

In the TPP Agreement (2016), the Parties reaffirm their obligations as members of the ILO and their commitments under the ILO Principles and Rights, including provisions on effective enforcement of labour laws, prohibitions on child labour, and also establishing specific institutional mechanisms to assist in its implementation (a Labour Council of senior governmental representatives).[179] On environmental issues, the TPP considers not only general commitments to not lower environmental standards, and not fail to effectively enforce their environmental laws in a manner affecting trade or investment, but it also includes specific obligations in relation to three multilateral environmental agreements that all TPP Parties have already ratified: the Montreal Protocol on Substances that Deplete the Ozone Layer, the International Convention for the Prevention of Pollution from Ships (MARPOL), and the UN Convention on International Trade in Endangered Species (CITES). [180]

5. Other areas where the level of ambition of the existing EU–Mexico agreement can be increased

For Mexico, the TPP is an agreement that includes provisions on the regulation of intellectual property rights (including GIs), SPS measures, and TBT. However, for the reasons explained below, it is unlikely that it will be considered by Mexico as a benchmark for negotiations with the EU.

Under the TPP, geographical indications (defined as 'indications that identify a good as originating in the territory of a Party, or a region or locality in that territory, where a given quality, reputation, or other characteristic of the good is essentially attributable to its geographical origin') are eligible for protection as trademarks.[181] This marks a departure from TRIPs (which deals with GIs separately from trademarks in Article 22) and from overall EU treaty practice. TPP Chapter 18 also requires more stringent requirements with respect to the protection of new geographical indications, including provisions on transparency, due process, and even the possibility of cancellation, as well as safeguards regarding the use of terms

[176] Chile-Mexico FTA, Article 9-15.
[177] Mexico-Peru FTA, Article 11.17.
[178] Pacific Alliance Protocol, Article 10.31
[179] TPP, Chapter 19.
[180] TPP, Chapter 20.
[181] TPP, Chapter 18, Articles 18.1 and 18.30.

that are customary in the common language. However, existing GIs pursuant to an international agreement are effectively grandfathered.[182]

The TPP also guarantees the protection of undisclosed tests or other data concerning the safety and efficacy of a pharmaceutical product for at least five years from the date of marketing approval of the new pharmaceutical product in the territory of the Party. This protection can be extended up to eight years with respect to biological products. The TPP also requires countries to implement a 'patent linkage' system, linking the drug regulatory process and the patent system. There are no equivalent provisions in CETA, and the EU strictly prohibits patent linkage systems, as the processing of marketing authorisation procedures can be carried out without being affected by the protection of industrial and commercial property interests.[183]

Like CETA, the TPP has built on WTO rules regarding SPS and TBTs issues, with contracting Parties declaring their shared interest in ensuring 'transparent, non-discriminatory rules based on science, and reaffirmed their right to protect human, animal, or plant life or health in their countries', and 'in transparent, non-discriminatory rules for developing technical regulations, standards and conformity assessment procedures, while preserving TPP Parties' ability to fulfil legitimate objectives'.[184] However, the TPP goes beyond WTO rules in SPS measures and includes more detailed transparency provisions, enhanced auditing procedures, and stringent provisions on risk assessment and on trade-restricting audits, certification, and import checks. For example, the TPP will enable exporters to participate in risk-related import processes, making it more difficult for importing Parties to arbitrarily restrict imports.[185] Annex 8-C to the TBT chapter applies specifically to pharmaceuticals, and includes additional provisions on the information that regulatory authorities should consider in making a marketing decision (Article 7bis), regulatory harmonisation (Article 5), and pharmaceutical inspection (Article 12c).[186]

[182] TPP, Articles 18.31 – 18.36.
[183] Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use.
[184] 'Summary of the Trans-Pacific Partnership Agreement' <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/summary-trans-pacific-partnership> accessed 29 February 2016.
[185] Scott Andersen and others, 'SPS Measures and the TPP – Removing Barriers to Agricultural Exports' (*Sidley*, 24 February 2016) <http://www.sidley.com/news/2016-02-24-international-trade-update> accessed 29 February 2016.
[186] Joel Lexchin, *Involuntary Medication* (Canadian Centre for Policy Alternatives 2016) 8-10 <https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2016/02/Involuntary_Medication.pdf> accessed 29 February 2016.

6 Conclusions

This section addresses the questions explicitly formulated in the ToR, based on the analysis conducted in the previous sections, and supplements it in a few aspects.

6.1 Is there a real need for an update of the trade pillar of the EU Global Agreement with Mexico?

The authors agree with the consensus existing on both the EU and Mexican sides on two considerations:

- The 1997 Global Agreement between the EC and its Member States and Mexico, together with the set of decisions taken in its framework, has not worked poorly and has not given rise to any specific problems. Therefore, there is no 'need' to modify the agreement in the sense of 'fixing something that doesn't work'.
- The 'convenience' to modify the agreement stems from the numerous and far-reaching changes that have taken place in the last 18 years, and the desire to provide an adequate answer to them. These transformations concern both Mexico and the EU and can be summarised as follows:
    - First, the global economy has changed, and there has been a shift in the geopolitical and geo-economic centres of gravity towards the Pacific;
    - Second, the fading expectations for the WTO Doha Round, whose launch favoured limiting the ambition of the decisions that in 2000 and 2001 gave content to the 1997 agreement;
    - Third, the perception of Mexico as an increasingly important regional player in the Americas, and a country that is simultaneously Latin American, North American, and in the Pacific Rim. This is linked to the falling expectations concerning Brazil's internal evolution and international role; and
    - Fourth, the improved perception of Mexico as a reliable international player that respects its international commitments and cooperates loyally in international fora.

However, as a matter of convenience (and not to fix something that went wrong), the priority that should be given to updating the trade pillar of the EU-Mexico Global Agreement depends on the content of this update. It is doubtful whether a purely cosmetic and presentational update would be worthwhile. If the update led to complications, it could even be harmful for trade relations, which until now have developed satisfactorily and without any noticeable difficulties.

6.2 If such a need exists, in which areas and to what extent should the trade pillar of the EU- Mexico Global Agreement be upgraded? What EU trade and investment agreement model should be the reference?

1. Thematic coverage

It seems that both the EU and Mexican sides generally favour a very wide (in fact, nearly limitless) thematic coverage for updating the existing agreement. The problem does not lie in the thematic coverage, but on its depth and effective content (an issue that will be elaborated in the next section).

Concerning narrowly defined trade aspects, there seems to be no doubt that the EU will face very specific demands from the Mexican side that could be contentious: the inclusion of agricultural products left aside in 2000 is an obvious candidate to be raised, as is revision of EU rules of origin, allowing for accumulation of origin, and specific demands on aspects of services and investment in the services

sectors (but countered by opposite demands from the EU side). Mexico will also likely raise the issue of movement of salaried workers and the applicable legal regime, at least as a defensive move to counter EU demands in other areas.

A potentially very contentious area is the coverage of investment and investment protection. This is a non-issue for Mexico, which feels perfectly comfortable with its BITs with most EU Member States. The EU will have to convince Mexico (and its own Member States) that introducing a new chapter that modifies the BIT approach makes sense in the context of new EU–Mexico negotiations. The EU could make the claim that its new approach on investment protection (already included in the EU-Vietnam FTA and proposed by the European Commission for the TTIP negotiations and the re-negotiation of CETA) leaves more policy space to Mexico and better protects the country against unfounded ISDS claims. However, even in this context, if the EU wants to pursue the idea of an investment court with Mexico, advanced both in the TTIP negotiations and in the EU-Vietnam FTA and CETA, it will require some convincing for a country that, overall, does not have negative perception of ISDS.

Finally, regulatory convergence is mentioned by both sides as a privileged 'new topic' that should be addressed by the new arrangements. However, it will certainly be approached very differently by Mexico and the EU (this will be explained in the following paragraphs).

2. What type of EU agreement should be the reference?

This question is only relevant if the TTIP negotiations do not lead to the ambitious outcome some predict, fear, or wish. If the TTIP becomes a success, the authors share the unanimous view that the EU–Mexico negotiations will mirror the TTIP's.

If TTIP negotiations continue to drag on or reach a very modest outcome, the question of the type of EU agreement that should/could be used as a reference or 'model' for EU–Mexico negotiations remains wide open. The authors insist on the need to broaden the analysis and not to limit the discussion to the more recent agreements, which are increasingly 'NAFTA-ised' and distant from the EU agreements more close to the EU 'spirit'. Copying and pasting recent EU agreements with only minor adjustments (probably CETA, because of geographical and time vicinity) would certainly be an all too easy negotiating recourse. However, it is doubtful that this method serves EU interests, and it certainly does not serve the Mexican objective of striking a dynamic agreement that offers continuous support for its internal policy reform (an objective that, if achieved by the new agreement, would also enhance the EU's international role as 'rule setter').

This is the reason why the authors consider that the search for the best model of reference should be enlarged to the 'old' Association Agreements that had a distinctive 'EU flavour' in their thematic coverage and dynamic nature. If the agreement establishing an EEA seems too ambitious, the model of the Europe agreements seems to perfectly fit the conveniences of the negotiation. It should be underlined that, contrary to common belief, Association Agreements have nothing to do with EU enlargement and accession negotiations. The most ambitious Association Agreement (the EEA agreement) was conceived with the absolute opposite objective (i.e. to stop European Free Trade Association (EFTA) countries from entering the EC). Additionally, the Euro-Mediterranean Association Agreements have never been thought of from the perspective of accession, and this has also been true with the Europe agreements, which do not mention future accessions (unthinkable when they were designed). The best proof of this notion is that when the road to accession was finally open, a completely new instrument had to be invented (the Accession Partnerships), as the Europe agreements were useless in this regard.

The Europe agreements model would be particularly adequate to tackle the 'new' issues that should (or could) be addressed in the upcoming negotiations, and that are dealt with in the TPP and the PA frameworks with an approach different from that adopted by the EU. This concerns not only areas like government procurement, investment, and regulatory convergence, but particularly IPRs, GIs, SPS

measures, and TBTs. Finally, the discussion should also cover whether any new agreement with Mexico should be an 'open' or 'hub' agreement, allowing it to convene other countries in the Pacific Rim, mainly those in Latin America. Some of the best-informed persons interviewed, both in the EU and in Mexico, were clearly in favour of such an approach.

6.3 What are the main expectations and concerns on both sides – EU and Mexico?

On both sides the expectations are generally very high and favour a very ambitious agreement, while the concerns are very low.

However, while agreeing on the objective of large coverage for the new agreement, the EU and Mexican perspectives diverge radically on the agreement's relationship with existing and future legislation in the areas falling within its scope. For the EU, the 'ambitiousness' of the agreement must not entail any modification of existing legislation besides the needed preferential modification of some import conditions (tariffs and tariff-rate quotas, and maybe some rules of origin) and what has been agreed in the WTO framework on export subsidies. This approach necessarily leads to an agreement that is very wide but not very deep. Alternatively, for Mexico the agreement must be instrumental to its ongoing internal reform in all areas of economic policy, and to its goal of legislative modifications.

This divergence has two extremely important consequences. On one side, it is perfectly possible that the EU initiative in launching the negotiation turns to Mexico in the course of the negotiations, as Mexico becomes much more offensive and less defensive than the EU.

On the other side, it concerns the overall architecture of the agreement. Mexico demands a dynamic agreement in whose framework new normative developments take place and are favoured. For Mexico, 'regulatory convergence' means exactly this: developing new norms with the EU within the framework of the agreement (that could even be used to oppose unwarranted demands from the United States). It is very doubtful that the EU will accept losing its legislative autonomy (and the European Commission its monopoly of initiative) in that context.

6.4 What are the main obstacles (political and economic) the negotiations may face in EU- Mexico?

There are no serious identifiable political obstacles at this stage. As said, expectations are high on both sides.

On the EU side, an ambitious agreement will certainly face the typical legal and political problems arising from the distribution of competences between the EU and Member States. They will affect the nature of the agreement and its 'mixity', which is absolutely necessary if the agreement must be really ambitious. They will also affect the agreement's content and institutional arrangements, as the best Mexican experts have perfectly detected that the division in three distinct pillars tends to undermine the effectiveness of the agreement by insulating the trade pillar from the impulse it could receive from political dialogue.

On the Mexican side, the successful results achieved in the PA (with Chile, Colombia, and Peru, and with possible extensions to other Latin American countries like Costa Rica and Panama), as well as in the TPP will make it difficult to turn towards the EU, which is largely viewed as a declining world power. This should stimulate the EU to find an approach built on its real assets (including its leading world position in the fields of regional integration and regulatory convergence) instead of trying to run behind initiatives and approaches launched and promoted by other world powers.

Economic obstacles are not clearly identifiable at this stage. Agendas still remain in the hands of officials on both sides, and the business communities have not yet defined their offensive and defensive interests.

6.5 How does the planned upgrade fit into the new 'trade for all' EU strategy of October 2015?

This is a question for which discussion was not found in the previous sections for a very simple reason: the impression obtained by the authors, both from their desk research and their interviews, is that the EU strategy behind the negotiations is not what was designed in 'Trade for all' in October 2015, but that of 'Global Europe: Competing in the world' from October 2006.

It was 'Global Europe' that legitimised the race to negotiate bilateral agreements with many countries in the world, in order to 'open markets', favour exports, and through exports, favour growth (giving less importance to their possible adverse effects and the possible damage to the multilateral trading system). In the context of EU negotiations with Mexico, it seems that the meaning of 'Trade for all' is simply a warning for the implementation of 'Global Europe': that these bilateral agreements should take into account 'all interests', and not only economic operators. In practice (and always in the EU–Mexican context), the tendency seems to be to pursue this objective by adding chapters to those on trade and trade-related aspects, much more than by modifying the contents of trade policy.

Most 'new issues' underlined or pointed to in 'Trade for all' (gender, crime, sustainability – behind 'economic' sustainability) seem to remain completely alien to the prevailing trade policy perspective in the EU and Mexico. It is different with migration, which is an issue that Mexico will address from an economic perspective, as the movement of salaried workers. This is a topic that the EC Treaty has always considered 'economic' and that has been included in many EC agreements with third countries throughout its history.

It will certainly be difficult for the European Parliament to bring the trade for 'all' within the effective implementation of Global Europe. Therefore, the authors believe that the main policy discussion on 'strategy' to be conducted within the European Parliament should be whether a trade strategy like 'Global Europe' (which was designed well before the surge of the 2007-2008 economic crisis and its ensuing effects on EU integration) remains valid in 2016 to orient future negotiations with Mexico.

Annex I

The distinction between Right of Establishment and Movement of Capital[187]

Overview

The difference in scope of different international economic agreements and treaties dealing with 'Investment' is not sufficiently emphasised. BITs and NAFTA-like agreements include a single chapter on 'investment' covering all types of investment, in particular both 'direct' and 'portfolio' investment. In contrast, GATS covers only the first. From its beginning, the EC Treaty (ECT) included two separate chapters, one on 'establishment' and one on 'movement of capital'. The first covers mainly 'direct investment', while the second covers 'portfolio investment'. This separation is parallel (but not equivalent) to that established by general international law between the 'company' and the 'shareholders'.

The ECT approach is a sound one. Therefore, the progressive blurring of the distinctions in EU agreements with third countries, as well as in recent ECJ jurisprudence, is not a development to be welcomed.

Capital movements from third countries and the establishment of third-country nationals or companies in a given state are two different matters, even if important links between them may exist:

- Capital movements from third countries are transactions or transfers involving monetary or financial assets between those countries and the given state; they are not necessarily connected with establishment in a different country from the one in which the capital in question originated; and
- The establishment in a given state of a third-country national or company either requires the formation of a subsidiary undertaking, branch, or agency, or the total or partial acquisition of an existing entity; the capital needed for such formation or acquisition need not come from the third country of the national or company in question, or even from another third country: it may be obtained on the national financial market of the given state in which the establishment takes place.

The 'political logics' underlying the regulation of these two aspects are quite different and are generally managed by different ministries. The regulation of capital movements depends on macroeconomic policy and particularly on the following: the balance and composition of the balance of payments; exchange rate policy (which is interdependent and linked to the balance of payments policies); and problems of monetary stability and inflation control, among others. It is the domain of the Ministries of Economy (and, within them, of the Undersecretaries and Departments of the Treasury). The regulation of the right of establishment in the different economic sectors relies on other criteria and factors. It is not a matter of macroeconomic policy, but of the 'sectorial policies' (e.g. banking policy, telecommunications policy, energy policy, and industrial policy) and depends on the weight to legitimately be conferred to different interests that may be in conflict. It is the domain of the sectorial ministries (e.g. industry and agriculture, among others) or the corresponding undersecretaries when we are in the presence of a 'macro-Ministry' of Economy. The establishment of individuals and companies in the different sectors of the economy must be subject to a series of rules directed to grant, for example, the protection of consumers or the protection of the environment and the urban environment, which are not relevant from the macroeconomic point of view of the capital movements.

The difference between both issues can be easily seen when compared with the real world:

[187] Updated excerpts from Xavier Fernandez-Pons and Ramon Torrent (n 138).

- Each and every country combines one macroeconomic policy ('one' meaning a more or less liberal unique policy) with distinct sectorial policies on right of establishment ('distinct' in that they differ from one sector to another); and
- Several countries, both developed and developing, have carried out a major liberalisation of access to capital from third countries. However, none of these countries (at least not the developed ones) have completely liberalised the right of establishment for foreign companies in different sectors or the control of domestic companies by foreign capital. Two examples illustrate this point: both France and the United States have fully liberalised access of capital from third countries, but have maintained very tight restrictions on the establishment of foreign companies in certain sectors of the economy. Thus, for instance, the United States retains legislation that prevents domestic airlines from being controlled by foreign capital. Additionally, the French energy sector continues to be monopolised by a partially state-owned enterprise (*Electricité de France*).

In other words, nothing prevents a foreign company from spending billions of dollars on Wall Street or in the Paris Stock Exchange (capital movements). However, the creation of a subsidiary in France or the United States (or even the acquisition of major shares of a French or American company) in the energy or air transport sectors, respectively, is forbidden.

The different regulations of capital movements and the right of establishment from the perspective of EU law

As already mentioned, the distinction between these two areas of regulation in the ECT has been clear since its first draft. It devoted separate chapters (in Title III of Part Three) to the question of the movement of capital (Chapter 4 'Capital and payments') and the conditions of establishment (Chapter 2 'Right of establishment'). The Maastricht Treaty did not change that distinction; although it amended Chapter 4 of the ECT on 'Capital and payments' by substituting Articles 73b to 73g for Articles 67 to 73 (Articles 56 to 60 in the new numbering of the Amsterdam Treaty). The distinction remains in the currently in force TFEU that, in accordance with the Treaty of Lisbon, replaces the old ECT (see the regulations on the 'Right of establishment' in Articles 43-55 and on 'Capital and payments' in Articles 63-66).

The main differences between the two chapters concern: a) the scope of application; b) the types of rules and techniques of regulation employed; and c) the content of the obligations imposed.

a) Scope of application

Concerning the scope of application, there is an essential difference between the chapter on the movement of capital and the chapter on the right of establishment: the first covers not only the movement of capital between Member States, but also the movement of capital from third countries; the second covers, in principle, only the problem of the establishment of nationals and companies in Member States from the other Member States.

Even before Maastricht, the ECT referred to movement of capital with third countries. The Maastricht Treaty replaced the former ECT chapter on capital movements with a new set of provisions, and extended the depth and scope of the obligations imposed not only on Member States but also on the EC related to movement of capital to and from third countries.

On the contrary, as the Court of Justice specifically stressed, the chapter on the right of establishment 'contain(s) no provision on the problem of the first establishment of nationals of non-member countries'.[188]

Nevertheless, 'although the only objective expressly mentioned in the chapter(s) on the right of establishment […] is the attainment of [that] freedom(s) for nationals of Member States of the EC, it does not follow that the EC institutions are prohibited from using the powers conferred on them in that field in order to specify the treatment which is to be accorded to nationals of non-member countries'.[189]

Indeed, the EC legislator has introduced provisions on the right of establishment of companies and nationals of non-member countries into a number of acts based on articles in the right of establishment ECT chapter, that apply either to a specific economic sector or to a specific aspect of an undertakings' activities.

b) Types of rules and techniques of regulation

There is also a crucial distinction between the two chapters concerning the weight given to the different types of rules (of liberalisation of market access, NT, and uniform law/harmonisation) and the techniques for their production (primary law and secondary law).

The chapter on capital movements primarily uses the first technique: the introduction in the treaty of a series of obligations on liberalisation of access binding upon Member States (and upon the EU itself) once and for all. Given the ambition and universality of these kinds of obligations, there is little room left for the EU to legislate.

In contrast, the chapter on right of establishment combines both the first technique, i.e. the imposition of immutable and inflexible primary law obligations binding upon the Member States, and the second, i.e. entrusting the EU with the competence to produce 'secondary' rules.

c) The content of the obligations

The chapter on capital movements begins with an all-embracing and precise obligation of liberalisation of access (Article 63.1 of the TFEU): 'Within the framework of the provisions set out in this chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited'. Only a few very limited exceptions are later introduced to such a general obligation.

Conversely, the chapter on right of establishment is based on NT. This is how Article 49 is (and has always been) drafted: 'Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms […] under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital'. The obligation, in accordance with the inner logic of the NT principle, leaves a very large margin of manoeuvre to each individual Member State. Each of them can define the conditions and requirements to be respected by any firm that wants to be established in it.

Additionally, if the EC (now the EU) considers that divergences in national laws on establishment create problems for the functioning of the internal market, it can always adopt rules that harmonise them through secondary legislation.

[188] **Opinion of the Court of 15 November 1994, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property - Article 228 (6) of the EC Treaty. - Opinion 1/94, para. XV.**
[189] *ibid.*

The tendency to approach questions related to right of establishment under the perspective of the movement of capital

The dissimilarities in the legal approach between the chapter on capital movements and the chapter on the right of establishment bring about a 'preference' for one or the other set of rules when it comes to applying their different provisions to any issue that falls in between the scope of the chapters. The 'radical liberalisers' will always opt for the logic of the chapter on capital movements, which leaves little room to the legislator (national or EU) and simply establishes the principle of the free circulation of capital flows. On the contrary, 'regulationists' will choose the point of view from the chapter on the right of establishment, in which the general principle is that the right of establishment is regulated and, in any case, enables the EU to harmonise domestic laws. Indeed, it is the regulationist approach that could be labelled as 'communitarian', since the first approach (i.e. the 'radical liberalisers') does not pursue the involvement of the EU (in lieu of involvement from Member States), but rather the non-intervention of public powers (either the EU or the Member States), void of any possible content as a result of the all-encompassing liberalisation obligations.

What we criticise is not the existence of these two approaches and the two underlying ideological and political foundations, but a) the lack of a clear presentation, and b) the imposition of one (that of the 'radical liberalisers') as the only legally sound option. In truth, the rejected option is much sounder than the one gaining acceptance.

One of the authors already analysed and criticised elsewhere the evolution of the ECJ's 'golden share' jurisprudence that, following the European Commission, has adopted the 'radical liberalisers' approach. This approach has progressively placed into the chapter on movement of capital issues that, by all evidence, did not belong there. They instead belonged in the chapter on the right of establishment, thus transforming the ECT into an instrument of sheer deregulation, and 'NAFTA-ising' it.[190]

The evolution of right of establishment in ECJ jurisprudence and EU secondary law

The growing limitation of the regulatory autonomy of EU Member States concerning establishment has not just been the result of the '*vis attractiva*' of the chapter on movement of capital. It has also come about through the evolution of the ECJ's jurisprudence on right of establishment and the enactment of secondary law in this area. As a result of both developments, the main logic of primary law on right of establishment has been modified, moving it from the original 'NT plus harmonisation' perspective to that of 'liberalisation of access', as if the right of establishment had the same inner logic as the other 'four freedoms', which is clearly not the case. Indeed, nationals must 'get established' in their own country. They need an 'act of entry' (unless, very exceptionally, establishment in a particular activity is entirely unregulated), which is not necessary in the case of the other four freedoms. This is why 'right of establishment' cannot be conceived as a 'freedom to establish', irrespective of circumstances. This is also why the main focus concerning establishment is, in EU law, whether or not this 'act of entry' ('getting established') is more onerous for foreigners than for nationals: i.e. whether or not NT is respected.

[190] Ramon Torrent, 'Pourquoi un revirement de la jurisprudence 'Golden Share' de la Cour de justice de l'Union européenne est-il indispensable?' in Jean-Paul Jacqué (ed), *A man for all treaties: liber amicorum en l'honneur de Jean-Claude Piris* (Bruylant 2012) 539–563.

Bibliography

Aaron Cosbey, 'Inside CETA: Unpacking the EU-Canada Free Trade Deal' (*International Centre for Trade and Sustainable Development*, 3 November 2014) <http://www.ictsd.org/bridges-news/biores/news/inside-ceta-unpacking-the-eu-canada-free-trade-deal> accessed 3 February 2016

Alianza del Pacífico, 'Temas de Trabajo' (*Alianza del Pacífico*, 8 February 2016) <https://alianzapacifico.net/temas-de-trabajo/> accessed 8 February 2016

Andrew T. Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38 Virginia Journal of International Law 639

Bradly J. Condon, 'European Union-Mexico Economic Partnership Coordination and Cooperation Agreement' in Simon Lester and Bryan Mercurio (eds), *Bilateral and Regional Trade Agreements: Commentary and Analysis* (Cambridge University Press 2009)

Cass Sunstein, 'Reducing Red Tape: Regulatory Reform Goes International | The White House' (*White House Office of Management and Budget*, 1 May 2012) <https://www.whitehouse.gov/blog/2012/05/01/reducing-red-tape-regulatory-reform-goes-international> accessed 24 June 2015

Cecilia Malmström, 'Trade in the 21st Century: The Challenge of Regulatory Convergence' (*European Commission - Trade*, 19 March 2015) <http://trade.ec.europa.eu/doclib/docs/2015/march/tradoc_153260.pdf> accessed 22 June 2015

Citizens Trade Campaign, 'Trans-Pacific Partnership (TPP). Regulatory Coherence' (4 March 2010) <http://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacificRegulatoryCoherence.pdf> accessed 24 June 2015

Claude Barfield, 'The TPP: A Model for 21st Century Trade Agreements?' (*East Asia Forum*, 25 July 2011) <http://www.eastasiaforum.org/2011/07/25/the-tpp-a-model-for-21st-century-trade-agreements/> accessed 24 June 2015

Copenhagen Economics, 'Ex Post Assessments of Six EU Free Trade Agreements' (February 2011) <http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147905.pdf> accessed 3 February 2016

Debra P. Steger, 'CETA – A New Model for Regulatory Cooperation, Transparency and Coherence?' (6 May 2014) <http://slideplayer.com/slide/2411068/> accessed 23 June 2015

ECORYS, 'Ex-Post Evaluation of the Implementation of the EU-Mexico Free Trade Agreement' (11 May 2015) <http://www.fta-evaluation.com/mexico/wp-content/uploads/sites/2/2015/06/REVISED-Mexico-ITR-ex-post-11May.pdf> accessed 3 February 2016

European Commission, 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions Towards a Comprehensive European International Investment Policy' (7 July 2010) <http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf> accessed 3 February 2016

——, 'Investment Provisions in the EU-Canada Free Trade Agreement (CETA)' (26 September 2014) <http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf> accessed 1 February 2016

——, 'Transatlantic Trade and Investment Partnership. Trade in Services, Investment and E-Commerce. Chapter II - Investment' (12 November 2015) <http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf> accessed 5 February 2016

European Commission - Directorate General for Trade, 'Consolidated CETA Text, 26 September 2014' (*TDM Journal (Transnational Dispute Management)*, 26 September 2014) <http://www.transnational-dispute-management.com/journal-advance-publication-article.asp?key=544> accessed 21 October 2014

——, 'EU-Vietnam Free Trade Agreement: Agreed Text as of January 2016' <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> accessed 5 February 2016

European Parliament - Directorate General for External Policies, 'The Modernisation of the European Union-Mexico 'Global Agreement'' (January 2015) <http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534985/EXPO_STU(2014)534985_EN.pdf> accessed 4 February 2016

Franz Christian Ebert and Anne Posthuma, 'Labour Provisions in Trade Arrangements: Current Trends and Perspectives' <http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_192807.pdf> accessed 8 July 2014

Gonzalo Villalta Puig and Eric D Dalke, 'Nature and Enforceability of WTO-plus SPS and TBT Provisions in Canada's PTAs: From NAFTA to CETA' (2016) 15 World Trade Review 51

Government of Canada - European Commission, 'Framework on Regulatory Co-Operation and Transparency' (*Global Affairs Canada - Regional and Bilateral Initiatives*, 31 July 2002) <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/eu-framework.aspx?lang=eng> accessed 5 February 2016

Ian F. Fergusson and Bruce Vaughn, 'The Trans-Pacific Partnership Agreement' (2011) Congressional Research Service <https://www.fas.org/sgp/crs/row/R40502.pdf> accessed 24 June 2015

Ian F. Fergusson, Mark A. McMinimy and Brock R. Williams, 'The Trans-Pacific Partnership (TPP) Negotiations and Issues for Congress' (2015) <https://www.fas.org/sgp/crs/row/R42694.pdf> accessed 24 June 2015

Jeffrey S. Lantis, *The Life and Death of International Treaties : Double-Edged Diplomacy and the Politics of Ratification in Comparative Perspective* (Oxford University Press 2009)

Joel Lexchin, *Involuntary Medication* (Canadian Centre for Policy Alternatives 2016) <https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2016/02/Involuntary_Medication.pdf> accessed 29 February 2016

Kathryn Gordon and Joachim Pohl, 'Environmental Concerns in International Investment Agreements: A Survey' (2011) <https://www1.oecd.org/daf/internationalinvestment/investmentpolicy/48083618.pdf> accessed 21 January 2014

Lina Lorenzoni Escobar, 'Sustainable Development and International Investment: A Legal Analysis of the EU's Policy from FTAs to CETA' (2015) 136 Beiträge zum Transnationalen Wirtschaftsrecht, Heft <http://telc.jura.uni-halle.de/sites/default/files/BeitraegeTWR/Heft%20136.pdf> accessed 3 February 2016

Marco Tulio Venegas, 'Investment Treaty Arbitration Comparison - Mexico' (18 September 2015) <http://globalarbitrationreview.com/know-how/topics/66/jurisdictions/16/mexico/> accessed 28 January 2016

Marie-Anne Coninsx, 'La Cooperación Unión Europea-México Herramientas Para Un Mejor Futuro' (September 2011) <http://eeas.europa.eu/delegations/mexico/documents/projects/folleto_cooperacion_2011_es.pdf> accessed 3 February 2016

'México Y UE Fortalecen Cooperación En Materia Ambiental' *America Economia* (17 February 2013) <http://www.americaeconomia.com/politica-sociedad/politica/mexico-y-ue-fortalecen-cooperacion-en-materia-ambiental> accessed 3 February 2016

Ministerio de Comercio, Industria y Turismo de Colombia, '100 Preguntas de La Alianza Del Pacífico' (5 February 2016) <http://www.mincit.gov.co/tlc/publicaciones.php?id=7180> accessed 8 February 2016

Nikos Lavranos, 'The New EU Investment Treaties: Convergence towards the NAFTA Model as the New Plurilateral Model BIT Text?' (Social Science Research Network 2013) SSRN Scholarly Paper ID 2241455 <http://papers.ssrn.com/abstract=2241455> accessed 15 January 2014

Organisation for Economic Co-operation and Development (OECD), 'Regulatory Reform in the United States. Enhancing Market Openness through Regulatory Reform' (1999) <http://www.oecd.org/trade/2756360.pdf> accessed 24 June 2015

Paul Lalonde and others, 'Trans-Pacific Partnership: Landmark New Commitments on Government Procurement' (*Dentons*, 7 January 2016) <http://governmentcontracts.dentons.com/en/insights/alerts/2016/january/7/transpacific-partnership-landmark-new-commitments-on-government-procurement> accessed 29 February 2016

Peter Fuchs, 'Investment' in Scott Sinclair, Stuart Trew and Hadrian Mertins-Kirkwood (eds), *Making Sense of the CETA* (Canadian Centre for Policy Alternatives 2014) <https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2014/09/making_sense_of_the_ceta_INVESTMENT_0.pdf> accessed 3 February 2016

Philippe de Lombaerde, 'The EU-Mexico Free Trade Agreement: Strategic and Regulatory Issues' (2003) 11 Journal of European Studies 104

PriceWaterhouseCoopers (PwC) Mexico, 'Doing Business in Mexico. Automotive Industry' (September 2014) <https://www.pwc.de/de/internationale-maerkte/assets/doing-business-mexico-automotive.pdf> accessed 4 February 2016

ProMéxico, 'National Flight Plan. Mexico's Aerospace Industry Road Map 2014.' (July 2014) <https://www.promexico.gob.mx/documentos/mapas-de-ruta/Roadmap-Aerospace-2014.pdf> accessed 4 February 2016

Ramon Torrent, 'Regional Integration Instruments and Dimensions: An Analytical Framework' in Robert Devlin, Antoni Estevadeordal and Inter-American Development Bank (eds), *Bridges for development: policies and institutions for trade and integration* (Inter-American Development Bank : Distributed by the Johns Hopkins University Press 2003)

Ramón Torrent, '¿Cómo Gobernar Aquello Que Se Desconoce?: El Caso de La Comunidad Europea En Tanto Que Unión Económica Y Monetaria' (2005) 9 Revista de Derecho Comunitario Europeo 47

——, 'Las Relaciones Unión Europea–América Latina En Los últimos Diez Años: El Resultado de La Inexistencia de Una Política' [2005] Barcelona, OBREAL-EULARO

——, '¿Cómo Se Engendró En Los Años 1980 La Crisis Del Proceso de Integración Europea Que Ha Estallado En Los Años 2000?' (2007) 37 Cuadernos europeos de Deusto 145

Ramon Torrent, 'Pourquoi un revirement de la jurisprudence 'Golden Share' de la Cour de justice de l'Union européenne est-il indispensable?' in Jean-Paul Jacqué (ed), *A man for all treaties: liber amicorum en l'honneur de Jean-Claude Piris* (Bruylant 2012)

R. Bouzas and H. Stoltz, *Building a Trade and Investment Hub: Mexico and Preferential Trade Negotiations* (Flacso 2001)

Rodrigo Polanco Lazo, 'The Trans-Pacific Partnership Agreement and Regulatory Coherence' in Tania Voon (ed), *Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership Agreement* (Edward Elgar Publishing 2013)

Scott Andersen and others, 'SPS Measures and the TPP – Removing Barriers to Agricultural Exports' (*Sidley*, 24 February 2016) <http://www.sidley.com/news/2016-02-24-international-trade-update> accessed 29 February 2016

Scott Sinclair, Marc-André Gagnon and Joel Lexchin, 'Intellectual Property Rights - Pharmaceuticals' in Scott Sinclair, Stuart Trew and Hadrian Mertins-Kirkwood (eds), *Making Sense of the CETA* (Canadian Centre for Policy Alternatives 2014) <https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2014/09/making_sense_of_the_ceta_INTELLECTUALPROPERTYRIGHTS.pdf> accessed 29 February 2016

'SICE: Countries: Mexico : Trade Policy Documents' (*SICE - Foreign Trade Information System*, February 2016) <http://www.sice.oas.org/ctyindex/MEX/MEXagreements_e.asp> accessed 29 February 2016

Simon Lester, 'The New Investment Appellate Court Will Have Remand' (*International Economic Law and Policy Blog*, 2 March 2016) <http://worldtradelaw.typepad.com/> accessed 3 March 2016

'Summary of the Trans-Pacific Partnership Agreement' <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/summary-trans-pacific-partnership> accessed 29 February 2016

SUNY Levin Institute, 'The Environment and NAFTA' (2015) <http://www.globalization101.org/the-environment-and-nafta/> accessed 5 February 2016

Thomas Bollyky, 'Regulatory Coherence in the TPP Talks' in C. L. Lim, Deborah Kay Elms and Patrick Low (eds), *The Trans-Pacific Partnership: A Quest for a Twenty-first Century Trade Agreement* (Cambridge University Press 2012)

United Nations Commission on International Trade Law (UNCITRAL), 'Rules on Transparency in Treaty-Based Investor-State Arbitration and Arbitration Rules (with New Article 1, Paragraph 4 as Adopted in 2013). UN Doc. A/RES/68/462' <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html> accessed 14 October 2014

United Nations Conference on Trade and Development, *South-South Cooperation in International Investment Arrangements.* (United Nations 2005)

——, *Fair and Equitable Treatment: A Sequel* (United Nations 2012)

United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2014. Investing in SDGs: An Action Plan* (United Nations 2014) <http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf> accessed 26 June 2014

United States Trade Representative, 'Trans-Pacific Partnership (TPP) Trade Ministers' Report to Leaders' (12 November 2011) <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2011/november/trans-pacific-partnership-tpp-trade-ministers%E2%80%99-re> accessed 24 June 2015

——, 'TPP Full Text' (December 2015) <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> accessed 23 December 2015

Xavier Fernandez-Pons and Ramon Torrent, 'The (Unnoticed?) Contradictory Overlapping of International and Domestic Rules on FDI: Getting the Legal Facts Right. Society of International Economic Law (SIEL), 3rd Biennial Global Conference, Singapore July 2012' (Social Science Research Network 2012) SSRN Scholarly Paper ID 2091211 <http://papers.ssrn.com/abstract=2091211> accessed 3 February 2016

Agreement between the European Community and the United Mexican States on cooperation regarding the control of precursors and chemical substances frequently used in the illicit manufacture of narcotic drugs or psychotropic substances (Official Journal of the European Communities L 077, 19/03/1997, p 0024-0030)

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QA-01-16-355-EN-N (pdf)

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